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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM R. LUX,
Petitioner,

v.

FRANK ANGEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

JERRY WERTHEIM
STEVEN L. TUCKER
JOHN WENTWORTH

JONES, GALLEGOS, SNEAD
& WERTHEIM, P.A.
Post Office Box 2228
Santa Fe, New Mexico 87501
(505) 982-2691

Attorneys for Petitioner

PETITION FOR WRIT OF CERTIORARI

The petitioner, William R. Lux, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New Mexico Court of Appeals entered in this proceeding on November 18, 1980 (Appendix A).

I. QUESTIONS PRESENTED FOR REVIEW

1. Does a faculty member of a state university have a First Amendment right to give a prepared speech on a public issue, within the time, place and manner requirements set by the university, as long as the speech neither causes nor threatens interference with university operations, or, as held by the lower court, must the content of the speech "serve to foster rational discourse, exchange of ideas, and meaningful discussion" on the issue in order to be protected?

2. Is the standard defining the parameters of the right of free speech under the First Amendment the same or substantially the same for faculty members as it was held to be for students in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)?

II. PARTIES

The parties to the proceedings in the New Mexico Court of Appeals were the petitioner, William R. Lux ("petitioner" or "Dr. Lux"), who was the plaintiff-appellee, and the respondent, Frank Angel ("respondent" or "President Angel"), who was the defendant-appellant.[1]

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[1] The decision of the New Mexico Court of Appeals erroneously identifies other parties as "defendants-appellants" in that appeal. However, it is undisputed that the jury returned a verdict only against Frank Angel, only he appealed the Judgment to the New Mexico Court of Appeals, there was no cross-appeal, and Frank Angel was the only defendant-appellant.

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V. REPORT OF DECISION

The decision below is reported as *Lux v. Board of Regents of New Mexico Highlands University*, ___N.M.___, 622 P.2d 266 (N.M.App. 1980). The denial of Dr. Lux's Petition for Writ of Certiorari by the New Mexico Supreme Court is reported as *Lux v. Angel*, ___N.M.___, 622 P.2d 1046 (1980). The denial of petitioner's Motion for Rehearing on February 5, 1981, is unreported.

VI. JURISDICTION

The decision sought to be reviewed is the decision of the New Mexico Court of Appeals entered on November 18, 1980 (Appendix A). On December 5, 1980, petitioner filed a timely[2] Petition for Writ of Certiorari to the New Mexico Court of Appeals with the Supreme Court of New Mexico (Appendix B). That Petition was denied by the Supreme Court of New Mexico on December 22, 1980 (Appendix C). Petitioner filed a timely[3] Motion for Rehearing in the New Mexico Supreme Court on January 2, 1981 (Appendix D). On February 5, 1981, the New Mexico Supreme Court entered its order denying petitioner's Motion for Rehearing (Appendix E).

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

VII. CONSTITUTIONAL PROVISIONS

The relevant constitutional provision involved is the Free Speech Clause of the First Amendment to the Constitution of the United States, applicable to the states through the Fourteenth Amendment, which provides as follows:

> Congress shall make no law... abridging the freedom of speech, or of the press;...

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[2] Rule 28, N.M.R.App.P.Civ., provides that a Petition for Writ of Certiorari to the New Mexico Court of Appeals may be filed within 20 days of the date of the decision sought to be reviewed.

[3] Rule 19, N.M.R.App.P.Civ., provides that a Motion for Rehearing may be filed within 10 days of a decision of an appellate court. The denial of a Petition for Writ of Certiorari is a "decision" within the meaning of this rule. *Hayes v. Reeves*, 91 N.M. 174, 571 P.2d 1177 (1977). *See also*, Rule 23 N.M.R.App.P.Civ., governing the computation of time.

VIII. STATEMENT OF THE CASE

New Mexico Highlands University ("Highlands") is a state university located in Las Vegas, New Mexico. Petitioner was first employed at Highlands in 1971 as a teacher of southwestern history. In connection with and in addition to his work in the history department, Dr. Lux assisted with the preparation of a proposal for a Title III federal grant for the cultural heritage program at Highlands. With the assistance of petitioner, Highlands received a federal grant of $675,000 for the 1972-73 school year, which at that time was the largest Title III grant that the federal government had ever made in the United States.

As a result of his efforts, Dr. Lux was approached by the administration to become Assistant Academic Dean and Director of Title III programs at Highlands, which offer he accepted. He was employed in the dual capacity of Assistant Academic Dean/Director of Title III Programs and Associate Professor of History for the summer of 1972 and for the 1972-73 school year. This contract was renewed for the 1973-74 school year. As had been decided by the administration, during the 1972-73 and 1973-74 school years, the academic dean was Dr. Lux's superior, and it was through his office that petitioner functioned as Title III Project Director.

The first year of the grant passed with no unusual problems. However, from the beginning of the 1973-74 school year, the administration (principally President Angel) became actively involved in the direction of the Title III programs. President Angel took the position that Highlands should depart from the federally-approved budget and implement its own program. He proposed to depart from virtually every item, from the type of personnel to staff the programs to the programs to be offered; only the total amount being spent was unchanged. Dr. Lux repeatedly reminded President Angel of the requirements of the federal program, that certain National Teaching Fellowships had to be awarded to staff the various ethnic studies programs for the fall of 1973, and that failure to abide by the grant terms could jeopardize the grant and the programs. Nevertheless, President Angel consumed several months negotiating with Title III officials in Washington to make the federal program conform to his own. As a result of this delay, the grant budget was "impounded" by President Angel and the ethnic studies

programs—which had, in effect, been "promised" to the Indian, Chicano and Black students—failed to materialize in the fall of 1973.

Highlands was granted Title III monies for two major reasons. One, it had one of the largest enrollments of minority students—Spanish, Indian and Black—in the country; and, two, the majority of its students were considered to be low-income students. Given the make-up of the student body, the implementation of the programs which were funded by Title III monies was a major concern of students at Highlands. The inability to staff the three ethnic studies programs resulted in increasing student dissatisfaction which culminated in a student "takeover" of the administration building and, in particular, President Angel's office on September 25, 1973.

The Board of Regents of Highlands held a special meeting on Monday, October 15, 1973, to take up the grievances and demands of Chicano, Black and Indian students. Those grievances and demands centered on Title III. Dr. Lux was instructed by President Angel to be present at this Board of Regents' meeting and report on the administration of the Title III program and to give an assessment of "what had been happening in the university in the previous months." Dr. Lux did appear at the October 15, 1973, board meeting, which was open to and well attended by the public, and gave a prepared speech. The full text of the speech is quoted in the Opinion of the Court of Appeals (Appendix A) at pages A10-A12.

The speech he gave was, as instructed, his assessment of what was happening with the Title III programs at Highlands.

No evidence was offered during trial that Dr. Lux's speech in any way disrupted or adversely affected the operation of the university, or the Title III programs at Highlands. Every witness who testified on the issue expressed the opinion that Dr. Lux had every right to deliver the speech. Dean McGahan, Lux's superior at the time, stated that the speech "was not important. He was expressing his view." President Angel stated that Dr. Lux "had every right to speak on whatever subject he wanted to, or criticise me or do whatever he wanted to." (9 X 1859).

While President Angel always recognized Dr. Lux's right to give the speech, he nevertheless had a strong personal reaction to

it. Indeed, the speech so angered President Angel that he characterized it as a "vicious attack on me" and considered terminating Dr. Lux immediately. However, upon deliberation, he deemed it more prudent to allow the current situation to subside before taking action. (*See*, paragraphs 7 and 8 of President Angel's letter to Dr. Player which is quoted in the Opinion of the lower court (Appendix A) at p. A9).

However, President Angel testified that he later decided that Dr. Lux's objective in giving the speech was "to be recognized by the administration. Perhaps brought in closer to the administration." (8 X 1532). He therefore made every attempt to make Dr. Lux feel like he was "part of the inner, quote, sanctum, of the university." (8 X 1533). He stated that he "opened all doors that I possibly could" and that they "became very good friends after that." (8 X 1533). Further, in September of 1974, Dr. Lux was given the title of Assistant to the President for Planning and Development and Director of Title III, but his duties remained substantially the same.

On July 31, 1975, shortly before his own resignation, President Angel informed Dr. Lux that he was terminated as Assistant to the President and Director of Title III, effective August 31, 1975. President Angel never provided Dr. Lux with any official reason for the action taken, any notice of charges, any hearing or any opportunity to defend his position.

On March 18, 1976, petitioner filed a complaint in the District Court of the First Judicial District, County of Santa Fe, State of New Mexico,[4] under 42 U.S.C. §1983. The Complaint named eight defendants[5] and alleged three independent causes of action: (1) that petitioner was deprived of his First Amendment rights by

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[4] Petitioner could not bring this suit in federal court because of the defendants' immunity under the Eleventh Amendment. *See, Korgich v. Regents of New Mexico School of Mines*, 582 F.2d 549 (10th Cir. 1978).

[5] The original defendants were the Board of Regents of New Mexico Highlands University and Ben Roybal, Benny Flores, Orlando Ortiz, Alex Sanchez and Tom Wiley, its members, Frank Angel who was President at the time petitioner was terminated, and John Aragon, who succeeded Frank Angel as President upon the latter's resignation.

being terminated for exercising his right of free speech; (2) that petitioner was denied his right to due process of law and equal protection by not being afforded a hearing prior to termination; and (3) that petitioner was deprived of liberty without due process of law by respondent's accusations against him in connection with his termination.

The case went to trial in May of 1979. It would be fair to say that the great majority of the evidence in the 16-day trial related to the issue of whether petitioner's exercise of his right of free speech was a substantial or motivating factor in the defendants' decision to terminate him and, if so, whether the defendants would have terminated the plaintiff for legitimate institutional reasons even in the absence of the protected conduct.[6] All three claims went to the jury against all defendants. The jury returned a general verdict in the sum of $36,125 against defendant Angel only.

Respondent appealed to the New Mexico Court of Appeals raising a variety of issues in connection with all three claims. *However, neither at trial nor on appeal did the respondent contend that the October 15, 1973, speech or any similar conduct was not protected conduct under the First Amendment.*

The New Mexico Court of Appeals held that the trial court erred in failing to grant a directed verdict[7] for the respondent on all three claims (Appendix A). On the liberty issue, the court held that President Angel's damaging statements about Dr. Lux in reaction to the speech were made "in confidence" and not "made public." On the due process and equal protection claims, the court held plaintiff's situation to be distinguishable from that of another employee who had received a pre-termination hearing and with whom petitioner sought to be compared. While petitioner considers the decision below to be erroneous on these

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[6] This issue of causation is defined in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and has become known as "the Mt. Healthy issue."

[7] In order to grant a directed verdict under New Mexico law, the court must find, viewing all the evidence in favor of the successful party, that there was neither evidence nor inference from which the jury could have arrived at its verdict, *Leonard Motor Co., Inc. v. Roberts Corp.*, 85 N.M. 320, 512 P.2d 80 (1973); *Francis v. Johnson*, 81 N.M. 648, 471 P.2d 682 (N.M.App. 1970).

two claims, petitioner does not consider them to present any novel issue for this Court's consideration.

On the First Amendment issue, the court did not disturb the jury's finding in favor of petitioner on the *Mt. Healthy* issue. The court raised *sua sponte* the issue of whether the speech was protected conduct under the First Amendment and decided, as a matter of law, that it was not. The essence of the court's holding on this issue was expressed as follows:

> Plaintiff's comments were not made to the public, and only one sentence in plaintiff's speech related to administration of the Title III program at Highlands University. Rather than discussing the Title III program, which might have been a matter of legitimate public interest, plaintiff engaged in vituperation and personal vilification of "the Angel administration." Such a diatribe did not serve to foster rational discourse, exchange of ideas, and meaningful discussion about a matter of legitimate public interest, and it is these functions that "free speech" protections are intended to foster.
>
> Appendix A, p. A13 .

Petitioner filed a timely Petition for Writ of Certiorari with the New Mexico Supreme Court (Appendix B) contending, among other things, that the New Mexico Court of Appeals had departed from the basic standards laid down by this Court in prior First Amendment cases. The Petition was denied and petitioner file a timely Motion for Rehearing which was denied on February 5, 1981. (*See*, Appendices C, D and E and notes 2 and 3, *supra*).

IX. REASONS FOR THE ALLOWANCE OF THE WRIT

INTRODUCTION

Never before has a lower court held pure speech to be unprotected because the court subjectively found its content to be unproductive in resolving institutional problems. The lower court ignored this Court's long line of decisions protecting the right of free speech so long as there is no immediate threat of a substantial and material disruption to a valid state activity. However, this Court's application of these principles to faculty of educational institutions has never been made clear and,

consequently, the decision of the New Mexico Court of Appeals represents one of many lower court decisions creating new and sometimes unsupportable standards in this area. The urgency of clarifying the limitations on the right of free speech in this area could be no more clearly demonstrated than by the lower court's decision in this case.

1. THE EXTENT TO WHICH THE RIGHT OF FREE SPEECH OF A FACULTY MEMBER MAY BE DIFFERENT FROM THAT OF THE GENERAL PUBLIC OR A STUDENT HAS NEVER BEEN CLEARLY DEFINED BY THE COURT.

The parameters of the right of free speech for the general public have been defined in numerous prior decisions of this Court. These basic principles must be reviewed before considering whether the educational setting suggests an alteration of these standards for faculty and students and, if so, for what purpose and to what degree.

In *Bridges v. California*, 314 U.S. 252 (1941), this Court employed the well-known balancing test to define First Amendment freedoms and defined the type of interest required on the part of the state to justify suppression of one's speech.

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.
>
> *Id.* at 263.

In *Baumgartner v. United States*, 322 U.S. 665 (1944), this Court flatly rejected the concept, comparable to that employed by the lower court in the case at bar, that only tame, "meaningful" discussion is protected.

> One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.
>
> *Id.* at 673-674.

In *Terminiello v. Chicago*, 337 U.S. 1 (1949), it was held that the protection of speech which stirs dissatisfaction or even anger was not only consistent with First Amendment principles but the

purpose of them.

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.
>
> *Id.* at 4 (citations omitted).

In *Craig v. Harney*, 331 U.S. 367 (1947), this Court held that very harsh criticism of a judge was nonetheless protected conduct.

> This was strong language, an intemperate language, and, we assume, unfair criticism. But a judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him..." The vehemence of the language used is not alone the measure of the power to punish for contempt.
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> *Id.* at 376 (citation omitted).

The decision in *Wood v. Georgia*, 370 U.S. 375 (1962) is significant because it represents one of the early decisions concerning the First Amendment rights of one who, because of his employment, bears a relationship with the person he has criticized which might distinguish him from the public generally. In that case, a county sheriff was held in contempt for criticizing an action of a county judge which he characterized as "one of the most deplorable examples of race agitation to come out of Georgia in recent years." Nevertheless, the Court held that this conduct was protected in the absence of any evidence that the speech interfered with the performance of his duties as sheriff.

The most significant case in this area is *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In that case, this Court's history of protecting freedom of speech was exhaustively reviewed and

certain basic principles were confirmed.

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks, on government and public officials.
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> . . .
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> . . . The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered.
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> . . .
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> . . . To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to *vilification of men who have been, or are, prominent in church or state,* and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, *these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.*
>
> *Id.* at 270-271 (emphasis added).

The emphasized language of this quotation stands in sharp contrast to the decision below which held that petitioner's conduct was unprotected because it was characterized as a "vilification of 'the Angel administration.'" (Appendix A, pA31).

Turning from cases involving the public's right of free speech, we must consider whether these principles apply with equal force to the setting of educational institutions. The Court has held that teachers "are not relegated to a watered-down version of constitutional rights." *Garrity v New Jersey*, 385 U.S. 493, 500 (1967)[8]. The Court has, however, indicated that the educational

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[8] Particularly when the conduct involves or is closely akin to "pure speech," as in this case, the Court has held that the traditional "comprehensive protection under the First Amendment" applies with equal vigor in educational and non-educational settings. *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 505-506 (1969).

setting brings certain considerations to bear on the exercise of the right of free speech although these decisions have left the issue unresolved.

In the latter years of the 1960's, the Court decided three cases involving the right of free speech in the context of public schools and universities. As the following analysis demonstrates, the effect of these decisions is an indication that certain considerations unique to that situation result in a standard for free speech perhaps more limited than that afforded the public generally but little or no guidance has yet been provided by the Court as to what those limits may be in the case of faculty.

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), faculty and non-faculty employees of the State University of New York brought suit challenging the constitutionality of a law requiring state college officials to determine employee membership in "subversive" organizations. This Court reversed a three-judge court and held that the law violated the First Amendment rights of the employees. In the course of its opinion, this Court collected, reviewed and confirmed its prior decisions in this area, and the Court's commitment to the First Amendment rights of teachers, as expressed in that opinion, made it a landmark case.

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, [364 U.S. 479] at 487. The classroom is peculiarly the "marketplace of ideas."
>
> *Id.* at 603.

One year later, the Court decided *Pickering v. Board of Education*, 391 U.S. 563 (1968). In that case, a public school teacher was dismissed for making certain false statements in a newspaper article critical of the school board's financial policies. The main issue was whether the First Amendment rights of the public, as articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applied to the teacher in that case. Aside from the

issues raised by the falsity of the statements, the Court rather readily found that, under the circumstances of that case, the teacher's right of free speech was not significantly different from that of the general public. The basis for this conclusion was the Court's inability to identify any plausible argument as to why the teacher should be treated differently. The Court noted that there was no adverse impact on the school as a result of the statements because they were made after the proposed tax increase had been defeated at the polls. The Court also noted that "no question of maintaining either discipline by immediate superiors or harmony among co-workers is presented here." 391 U.S. at 570. Therefore, its conclusion on this issue was stated as follows:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.
>
> *Id.* at 572-573.

To assess the holding in the *Pickering* case, it is necessary to identify what the Court said and what it did not say. It did say that the teacher's right of free speech was not significantly different from that of the general public because there was no showing that his expression impeded the performance of his duties or interfered with the operation of the school. It did not say that any interference, no matter how slight, with his duties or the operation of the school would make his conduct unprotected. Because no such interference was found, the Court simply did not reach the issue of whether interference with school activities results in removing constitutional protection for expressive conduct or, if so, the amount and type of such interference which must be shown.

Beyond affirming the principles laid down in the *Keyishian*

case, it is difficult to identify any general principles established in the *Pickering* opinion which would assist in establishing even broad guidelines in this area. Even the members of the Court have indicated different views on the significance of the *Pickering* decision.

In the case of *Arnett v. Kennedy*, 416 U.S. 134 (1974), a case challenging the Lloyd-La Follette Act for overbreadth, several members of the Court commented on the *Pickering* decision. The plurality opinion cited *Pickering* for the proposition that the state has legitimate interests, as an employer, which must be balanced against the employee's interest in speaking out. *Id.* at 161-162. In the dissenting opinion of Justice Marshall, who authored the *Pickering* opinion, he emphasized the *Pickering* decision's holding on the employee's right of free speech, as opposed to a limitation on that right. *Id.* at 228-229. Justice Douglas warned against reading the dictum in *Pickering* as law.

> [I]n Pickering v. Board of Education, 391 U.S. 563, . . . the Court deemed what a teacher said against the school board was more important than the board's sensibilities. The Court, however, reserved decision where the comments of an employee involved "either discipline by immediate superiors or harmony among co-workers," *id.*, at 570. That is one reason why Mr. Justice Black and I concurred in the result . . . .
>
> *Id.* at 205 (Douglas, J., dissenting).

Accordingly, beyond the proposition that the interests of the school must be balanced against the interests of the faculty to define the limits of protected conduct, it is not clear whether this Court set or reinforced any standards in this area in *Pickering*. Even Justice Marshall, citing the *Pickering* decision, noted that "cases in this area hardly provide substantial guidance as to what speech is or is not protected." *Arnett v. Kennedy, supra* at 227, n. 30 (Marshall, J., dissenting).

However, in the following year, the Court did get more specific on this issue. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court held that the First Amendment rights of a student could not be restricted by school authorities unless a "substantial disruption of or material interference with school activities" actually resulted or could

reasonably be expected to result from the activity. *Id.* at 514. *See also, id.* at 509, 513.

Although the *Tinker* decision might be narrowly read to define the First Amendment rights only of students within an educational institution, the Court's opinion provides ample authority for the proposition that the enunciated standard applies to teachers as well.

> First Amendment rights, applied in the light of the special characteristics of the school environment, are available to *teachers and students.* It can hardly be argued that either *students or teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost fifty years. In *Meyer v. Nebraska,* 262 U.S. 390 (1923) and *Bartels v. Iowa,* 262 U.S. 404 (1923), this Court in opinions by Mr. Justice McReynolds, held that the Due Process clause of the Fourteenth Amendment prevents States from forbidding the *teaching* of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of *teacher, student* and *parent.*
>
> *Id.* at 506 (emphasis added).

Since the *Tinker* decision in 1969, this Court has not addressed itself to the issue of whether the "material and substantial disruption" standard applies to the First Amendment rights of faculty as well as students.[9] Nor has the Court provided further clarification as to the effect, if any, of the *Pickering* decision on defining the parameters of protected conduct. In short, since the *Tinker* case, lower courts have been required to chart this frequently-litigated and vital area with little guidance and with a multitude of results.[10]

There have, of course, been decisions involving the First Amendment rights of teachers in recent years, but these have basically involved collateral issues or principles established in

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[9] The Court has, however, decided student cases in this area. *See, e.g., Papish v. Board of Curators,* 410 U.S. 667 (1973); *Healy v. James,* 408 U.S. 169 (1972).

[10] See Section IX, part 2, *infra.*

prior cases. In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court held that the existence or non-existence of tenure was irrelevant to one's right of free speech. In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court held that one asserting a First Amendment claim must first prove that his constitutionally protected conduct was a "substantial" or a "motivating" factor in the decision not to rehire him and that upon, and only upon, such showing the burden shifts to the school authorities to demonstrate that they would not have rehired the plaintiff for other, legitimate reasons even in the absence of the protected conduct. In *Givhan v. Western Line Consolidated School District*, ___ U.S. ___, 99 S.Ct. 693 (1979), the Court held that the First Amendment protected private as well as public communications.[11] However, in neither of these cases nor in any other case in the past decade has the Court clarified the criteria to be applied to determine whether a faculty member's expression is so harmful to the educational institution that it is no longer protected by the First Amendment.

The conclusion to be drawn from this Court's prior decisions is that the protection of "uninhibited, robust and wide-open" debate afforded the general public applies to students and faculty as well unless, perhaps, a student or teacher causes or is likely to cause a material and substantial disruption of school activities. Thus, although teachers and students may not enjoy First Amendment protection to precisely the same extent as that of the general public, the limitations applicable to them appear to be narrowly drawn to fit the state's unique interest in providing public education. However, there is clearly no justification for a wholesale rejection of traditional First Amendment principles such as that demonstrated by the lower court in this case. The fact that such a decision was rendered in the distant wake of the *Keyishian, Pickering* and *Tinker* decisions demonstrates the importance of a definitive and immediate clarification of these fundamental principles by this Court.

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[11] In the *Givhan* case, the Court made a reference to the "interference" factor quoting from *Pickering*, 99 S.Ct. at 696, n.4. However, that brief reference, in a footnote, cannot be viewed as shedding much light on this issue given the context in which it was made and the narrow issue before the Court in that case.

2. CONFLICTS AMONG THE LOWER COURTS HAVE DEVELOPED IN THE ABSENCE OF A DEFINITIVE DECISION BY THIS COURT ON FUNDAMENTAL PRINCIPLES UNDERLYING A FACULTY MEMBER'S FIRST AMENDMENT RIGHTS.

In the absence of any further clarification of the Court's opinions in *Keyishian, Pickering* and *Tinker,* the lower courts have been applying a variety of criteria resulting in decisions which are inconsistent among the different jurisdictions and, in some cases, inconsistent within single jurisdictions. In what is probably a majority of cases, the lower courts have applied the *Tinker* "material and substantial disruption" standard to employee cases.[12] In some instances, the *Tinker* standard was adopted because there was no significant difference seen between the First Amendment interests of teachers and students and because the *Pickering* decision was not viewed as having established any standard in this area. As the Ninth Circuit stated rather bluntly, "*Pickering* did not establish the limits of the teacher's right to exercise First Amendment rights within the school." *Mabey v. Reagan,* 537 F.2d 1036, 1047 (9th Cir. 1976). In other instances, any test established in *Pickering* was deemed overruled by implication in the *Tinker* decision. *See, e.g., Hastings v. Bonner,* 578 F.2d 136, 143 (5th Cir. 1978), where the court describes the *Tinker* standard as a "different test" and a "more demanding" standard than that established in *Pickering.*

Some cases apply a standard even more strict, requiring the state to demonstrate a "compelling state interest" in order to restrict an employee's speech. *Van Ooteghem v. Gray, supra* n. 12 at 492. The Fifth Circuit has also pointed out that even a demonstration of "substantial and material disruption" of school activities does not automatically result in bringing the speech outside the ambit of First Amendment protection but is simply one of several factors to consider in making such a

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[12] *See, e.g., Hastings v. Bonner,* 578 F.2d 136, 143 (5th Cir. 1978); *Porter v. Califano,* 592 F.2d 770 (5th Cir. 1979); *Van Ooteghem v. Gray,* 628 F.2d 488 (5th Cir. 1980); *Mabey v. Reagan,* 537 F.2d 1036 (9th Cir. 1976); *Adamian v. Lombardi,* 608 F.2d 1224 (9th Cir. 1979); *Connecticut State Fed. of Teachers v. Board of Education Members,* 538 F.2d 471, 478 (2d Cir. 1976); *Russo v. Central School District No. 1,* 469 F.2d 623 (2d Cir. 1972); *Cary v. Board of Education,* 598 F.2d 535 (10th Cir. 1979); *Bertot v. School District No. 1,* 522 F.2d 1171 (10th Cir. 1975).

determination. *D'Andrea v. Adams*, 626 F. 2d 469 (5th Cir. 1980); *Downing v. Williams*, 624 F.2d 612 (5th Cir. 1980); *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979). Otherwise, valid criticism could cause a legitimate and much-needed "disruption" in the *status quo* but the teacher could be fired for causing a "material and substantial disruption." *Porter v. Califano, supra* at 779. *See also, Arnett v. Kennedy*, supra at 229-230 (Marshall, J., dissenting). In such a case, the issue is whether "the benefits of preventing the injury actually outweigh the profound benefits of free speech in this society. " *D'Andrea v. Adams, supra* at 477.

Decisions in this area based upon the *Pickering* case have produced a variety of different standards. For example, the Seventh Circuit has viewed *Pickering* as mandating a six-part test,[13] two-part test,[14] and another six-part test,[15] none of which are the same.[16]

The need for clarification of this issue by the Court is illustrated by decisions of courts which freely devise their own standards in the absence of controlling decisions by this Court. For example, in *Stewart v. Bailey*, 556 F.2d 281 (5th Cir. 1977), the court held:

> Finally, this court recognizes that "[t]he college had no right to control his speech or to curtail his freedom of association but they did have a right to terminate his employment as a classroom instructor *at the point where the exercise of his constitutional privileges clearly over-balanced his usefulness as an instructor.*" (Emphasis added).
>
> *Id.* at 284 (emphasis added).

Perhaps even more surprising than the court's reference to the right of free speech as a "privilege" is the court's holding that a teacher's ability to exercise that right depends upon his "usefulness as an instructor." This standard implies that the more

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[13] *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972)

[14] *McGill v. Board of Education*, 602 F.2d 774 (7th Cir. 1979)

[15] *Yoggerst v. Stewart*, 623 F.2d 35 (7th Cir. 1980)

[16] *Cf. Bernasconi v. Tempe Elementary School District No. 3*, 548 F.2d 857 (9th Cir. 1977) (applying a four-part test derived from *Pickering*.)

useful an instructor is, the greater First Amendment rights he has. This Court has never indicated that better teachers have greater First Amendment rights than poorer teachers. Of course, a teacher may be terminated because he is a poor teacher, but not because he exercises his right of free speech. *Mt. Healthy City School District Board of Education v. Doyle, supra.*

Finally, exemplifying appellate courts creating their own standards in this area is the decision of the New Mexico Court of Appeals in the case at bar. The lower court's first observation is that plaintiff's speech was "not made to the public." (Appendix A, p. A13). As this court squarely held in *Givhan v. Western Line Consolidated School District, supra,* the First Amendment protects critical remarks made to one's superiors in private as well as in public, particularly where the superior has invited the comment as in this case.[17]

Secondly, the lower court mischaracterized petitioner's speech by saying "only one sentence in plaintiff's speech related to administration of the Title III program at Highlands University." (Appendix A, p. A13). Petitioner submits that this Court can easily determine for itself that the entire speech related to the administration of the Title III program. This Court has not only the authority but the duty to make its "independent examination" of the speech for this purpose.[18] Moreover, the lower court apparently viewed the subject of the overall administration of a state university (as opposed to the

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[17] Petitioner had no opportunity to bring the *Givhan* case to the attention of the Court of Appeals prior to its decision, since, as pointed out in the Statement of the Case, *supra*, the issue of whether plaintiff's conduct was constitutionally protected was not raised by the respondent, Dr. Angel, but was raised and decided by the Court of Appeals, *sua sponte*.

[18] As stated in *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974):

> The Court has often recognized that in cases involving free expression we have the obligation, not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under federal law. "We must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."

Id. at 282 (citations omitted).

administration of a specific program) to be something other than a matter of "legitimate public concern" as that phrase was used in the *Pickering* case. Not only is there no authority for such an unreasonable construction, but Justice Marshall, who authored the *Pickering* opinion, has clarified that the distinction intended in *Pickering* was "between statements which pertain to legitimate subject of *public* comment and those which disclose *confidential* government information." *Arnett v. Kennedy, supra* at 231, n. 32 (Marshall, J., dissenting) (emphasis added). Thus, the distinction is between clearly public issues as opposed to confidential issues, not public issues *generally* as opposed to public *institutional* issues. If the administration of a public institution is not a subject of legitimate public concern, it is difficult to imagine what is.

Finally, and most critically in terms of this petition, the lower court held that free speech protection is afforded those expressions which "serve to foster rational discourse, exchange of ideas, and meaningful discussion about a matter of legitimate public interest." (Appendix A, p. A13). The judgment on the verdict in favor of petitioner was reversed because the New Mexico Court of Appeals did not feel that petitioner's speech met this standard.

There is no authority for this standard and the lower court cited none. The most disturbing feature of this standard is that it contains no requirement that there be any disruption or interference whatsoever with the operations of the university. It must be considered significant that there was no evidence presented that petitioner's speech caused or was likely to cause any interference with the operation of the university and neither the jury, nor the trial court, nor the New Mexico Court of Appeals found any such interference. If there is any point on which the prior decisions of this Court in *Pickering* and *Tinker* and the other lower courts agree, it is that one cannot be punished for expressive conduct which causes *no* disruption. Now, for the first time, a lower court has held that to qualify for free speech protection, the speech must "serve to foster rational discourse." In other words, it is not enough that the speech cause no harm; it must produce a positive result, and it must do so to the satisfaction of the subjective standard of the judge or judges

deciding the case. If one person's opinion of what "serves to foster rational discourse" defines the limits of free speech, then the right to speak freely has been destroyed even if that person's opinion is the most enlightened imaginable.

Unless this petition is granted, there is no reason to presume that the decision of the lower court in this case will not be followed, at least in New Mexico if not elsewhere, or that other lower courts will not similarly feel free to depart from fundamental First Amendment principles.

3. A LACK OF CLARITY IN THE LAW, WHILE ALWAYS UNDESIRABLE, HAS ITS MOST HARMFUL AND DANGEROUS IMPACT IN THE AREA OF FREE SPEECH.

Providing much-needed guidance to the lower courts and parties in pending cases would be reason enough to grant this petition. However, there are many more individuals whose rights are at stake here—individuals whose jobs or conduct may hang in the balance even though they may never be a party to a lawsuit. We are referring, of course, to those many employees who feel that they must curtail their expressions not because the free speech standard is so strict, but because it is unknown.

This Court expressed its concern with this very problem in the *Keyishian* case, fourteen years ago.

> When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone..." *Speiser v. Randall*, 357 U.S. 513, 526. For "[t]he threat of sanctions may deter... almost as potently as the actual application of sanctions." *N.A.A.C.P. v. Button*, [371 U.S. 415] at 433. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.
>
> *Id.* at 604.

Because the lower courts have been applying diverse and self-made standards in this area, anyone who speaks out does so at his peril. The need for this Court to provide "sensitive tools which

clearly inform teachers what is being proscribed" has never been greater than it is now.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New Mexico Court of Appeals.

Respectfully submitted,

JERRY WERTHEIM

STEVEN L. TUCKER

JOHN WENTWORTH

JONES, GALLEGOS, SNEAD & WERTHEIM, P.A.
Post Office Box 2228
Santa Fe, New Mexico 87501
(505) 982-2691

Attorneys for Petitioner

DATED: April 27, 1981

APPENDIX

APPENDIX A

IN THE
COURT OF APPEALS OF THE STATE OF NEW MEXICO

WILLIAM R. LUX,

Plaintiff-Appellee

v. No. 4285

THE BOARD OF REGENTS OF NEW MEXICO HIGHLANDS UNIVERSITY and BEN ROYBAL, BENNY FLORES, ORLANDO ORTIZ, ALEX SANCHEZ, TOM WILEY, Its Members; FRANK ANGEL, Its Former President; JOHN ARAGON, Its Current President; in their individual and official capacities,

Defendants-Appellants

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

GARCIA, Judge

COURT OF APPEALS OF NEW MEXICO

FILED

NOV. 18, 1980

JERRY WERTHEIM
JOHN WENTWORTH
STEVEN L. TUCKER
Santa Fe, New Mexico

Attorneys for Appellee

ARTURO G. ORTEGA
MICHAEL D. BUSTAMANTE
Albuquerque, New Mexico

Attorneys for Appellant

OPINION

HERNANDEZ, Judge

This case stems out of the non-renewal of the contract of plaintiff, a tenured professor, as Assistant Academic Dean and Director of Title III programs. Plaintiff brought suit against the Board of Regents of New Mexico Highlands University, the members individually, the former President Frank Angel and the current President John Aragon. Plaintiff alleged violations of his rights under the First and Fourteenth Amendments to the United States Constitution and violation of Title 42 U.S.C. A. §1983, as well as deprivation of his due process rights and rights of equal protection under the New Mexico Constitution. The jury returned a verdict in favor of plaintiff against only one of the defendants, Frank Angel (hereinafter Angel).

Plaintiff was hired as a professor of Southwestern history in 1971. He was granted tenure a year later. Plaintiff was employed in the capacity of Assistant Academic Dean, Director of Title III programs and Associate Professor of History for the summer of 1972 and for the 1972-73 school year. The specific Title III program which plaintiff was to direct was a three year grant from 1972 through the 1974-75 school year. During the 1973-74 school year disagreements developed between plaintiff and Angel concerning the Title III program.

Student dissatisfaction with the program led to a student takeover of the administrative offices in September, 1973. Angel then directed plaintiff to report to the Board of Regents on the program and on the student situation. Plaintiff appeared before the Regents in October, 1973, and gave a prepared speech which was described as "very critical of the administration of Highlands University" in the official minutes of the meeting. Angel began assuming more control over operation of the Title III program and in August, 1974, he reorganized the program and placed plaintiff as head of a university-wide committee selected to administer the program. Plaintiff felt that Title III requirements were being violated, and in June, 1975, sent a letter to the Regents which was highly critical of the program administration. On July 31, 1975, President Angel informed Lux that his employment as Assistant to the President and Director of Title III would not be renewed and so would terminate on August 31, 1975. Plaintiff's

employment as a history professor at Highlands was continued.

In district court, defendants filed a motion for summary judgment; the motion was granted as to the Board of Regents and President Aragon, reserving the issue of a de facto tenure claim advanced by plaintiff. Summary judgment as to Angel was denied. Defendants moved for a directed verdict at the close of plaintiff's case in chief, and it was granted as to the de facto tenure claim. The court denied a directed verdict on all other claims. At the close of all evidence, defendant Angel again moved for a directed verdict on the basis that plaintiff had failed to carry his burden of proof on all issues. The motion was denied. The verdict was for plaintiff; Angel's motions for judgment n.o.v. and for a new trial were denied.

Plaintiff's first contract with the University, in the dual capacity of professor and administrator, read as follows:

NEW MEXICO HIGHLANDS UNIVERSITY

Las Vegas, New Mexico

NAME Dr. William R. Lux

In accordance with the Statutes of the State of New Mexico and the Bylaws and regulations of the University Board of Regents, you are hereby appointed, in probationary status, Assistant Academic Dean (Director of Title III) and Associate Professor of History* at New Mexico Highlands University from September 1, 1972, to September 1, 1973, for 12 months' services, payable in 12 monthly installments of $1,583.33 each. ($19,000 per annum)

You will be required to teach at least nine quarter hours per year.

The tenure policy of New Mexico Highlands University, printed on the back of this form, is a part of this contract. Years of credit in other institutions allowed on five-year probationary period: Three

This agreement cancels all other existing agreements for the period and services covered, and your acceptance hereof is indicated by your signature below. This written

acceptance, to be effective, is to be received in the office of the President within ten days of the date of approval given below, unless an extension of time is given in writing by the President.

Signature of Appointee: APPROVED: Frank Angel
President of Univ.

s/ William R. Lux Date of Approval 5/22/72

Date of Acceptance:
Acct. No. 211-202-$3,400
834-201-$15,500
May 22, 1972 (Title III)

It will be noted that plaintiff's teaching duties were specified and that his salary came from two separate accounts, part for his duties as an instructor and part for his duties as an administrator. The phrase "in probationary status" refers to his status as a member of the faculty. On the reverse side of this contract form were printed the regulations concerning tenure of faculty members and they provide in this regard: "All other new appointments shall be probationary. Probationary appointments shall be for one year, renewable year by year for a five-year period." Earlier that same year, April 17th, plaintiff had been given a contract as "Associate Professor of History" alone and that phrase was in that contract. Plaintiff's contract for the period from September 1, 1974 to August 31, 1975, read as follows:

NEW MEXICO HIGHLANDS UNIVERSITY

Las Vegas, New Mexico

NAME Dr. William R. Lux

In accordance with the Statutes of the State of New Mexico and the Bylaws and Regulations of the University Board of Regents, you are hereby appointed, in permanent status, Associate Professor of History; Director of Title III, Assistant to the President for Planning and Development at New Mexico Highlands University from Sept. 1, 1974, to August 31, 1975, for 12 months' services, payable in 12 monthly installments of $1833.33 each ($22,000 per annum).

The tenure policy of New Mexico Highlands University, printed on the back of this form, is part of this contract. Years of credit in other institutions allowed on five-year probationary period: On tenure

This agreement cancels all other existing agreements for the period and services covered, and your acceptance hereof is indicated by your signature below. This written acceptance, to be effective, is to be received in the office of the President within 10 days of the date of approval given below, unless an extension of time is given in writing by the President.

Signature of Appointee: APPROVED Frank Angel
President of the Univ.

Date of Approval 9/16/74

s/ William R. Lux

Date of Acceptance:

9/16/74

Account No. 834-201-$11,000
251-201-$11,000

The law applicable to the alleged deprivation of plaintiff's liberty interest is as follows:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of hearing is paramount. But the range of interests protected by procedural due process is not infinite.
>
> . . . .
>
> But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature of the interest at stake*. [Citations omitted.] We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.
>
> . . . .
>
> While the Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth

> Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life . . . .
>
> . . . .
>
> There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated.

Board of Regents v. Roth, 408 U.S. 564 (1972). "Subsequent lower court decisions have interpreted the guidelines articulated in *Roth* to require that an employee claiming an infringement of liberty show that the government's action was likely to either seriously harm his standing in the community or foreclose his future opportunities for reemployment." Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977). "But not every remark which may arguably affect one's reputation violates due process if made by a government official without a hearing, for the fourteenth amendment protects only against charges that 'might seriously damage [one's] standing and associations in his community.' " Lipp v. Board of Education, 470 F.2d 802 (7th Cir. 1972). "To infringe one's liberty, the effect of government action on future employment must extend beyond a disadvantage or impediment; it must 'foreclos[e] his freedom to take advantage of other employment opportunities.' " Mazaleski v. Treusdell, *supra.*

The statements made by Angel which plaintiff claims seriously damaged his standing and reputation as professor and administrator are the following: From a three-page memorandum dated July 10, 1973, sent by Angel to two members of the Board of Regents, the part pertaining to plaintiff reads as follows: "Now it appears that [the Chicano organization on campus] has fractionized [sic], with La Raza Unida group dominating . . . Two professors, Pedro Rodriguez and Bill Lux, are probably the real behind-the-scenes leaders. Pedro especially is a behind-the-scenes manipulator. He never openly shows his claws." A draft of a letter addressed to a Dr. Player, which was never sent, a copy of which was given to Dean McGahan, professor of Botany and Academic Dean, in pertinent part reads as follows:

(Angel's personal handwritten note at top of page) "Marie's file for future references *confidential*"

DRAFT:

Letter to Dr. Player:

I am writing this letter to you because I know of no other recourse and am seeking advice.

We have a Title III grant for 1973-74 for $500,000. A grant which can make significant contributions to the development of this institution.

A year and a half ago we appointed Dr. William Lux, a Chicano professor in the History Department, as Director of Title III and, in an effort to bring Title III programs into the mainstream of the University, we also added the title of Assistant Academic Dean.

The original budget sheets were submitted by Dr. Lux early in the Summer and approved. However, they were never discussed with me and, as chief administrator officer, I am deeply concerned with grants especially one which amounts to nearly 25% of our state appropriation.

When the budget was finally brought to my attention in late summer I discovered Dr. Lux had inflated administrative costs, by assigning himself an executive secretary (which, in our type of organization is a level of secretary assigned only to the President) and an administrative assistant which is a position not approved for any administrator, including the President. Furthermore, there were errors in calculation and almost nothing for evaluation which we consider critical.

The following are some of the factors that have gone into this problem:

1. There is, on the campus and the community, a very small (50-60) group of extremist Chicanos who have a narrow, self-serving, concept of Chicanismo. They have the idea that this institution should become entirely Chicano and that I, because I am a Chicano, should yield to their

demands. There are many reasons why I cannot and will not. Because they have access to the operation of Title III through Dr. Lux, who is their behind-the-scenes leader, they are using the program as a symbol. Incidentally, there have been repeated and substantial expressions of support for me and my administration from a majority of the students, the faculty, and the community.

2. Because of my inability to trust Dr. Lux I wrote to Ms. Dickerson that I, personally, would be the official signatory and contact person for all matters concerning Title III. In spite of this, there is very good evidence, although denied, that Ms. Dickerson and Dr. Lux are still in contact with each other on matters concerning Title III.

3. Dr. Lux has assumed that the title of Director has given him virtual autonomous authority overall [sic] Title III monies and program. A procedure not accepted in this University for any program.

3. [sic] As a result of the above I told Dr. Lux that he would be a "coordinator" and not a "Director" of Title III. At this point he made an implied threat of legal action because his contract has the latter title. This is not important because I can redefine duties as they will best benefit the University.

4. Dr. Lux publicized this change of Title III and, by distorting the implications of it contributed to the resignation of the Coordinator of Chicano Studies on August 26—three weeks before the fall term began. We are still without a coordinator. Incidentally, Dr. Lux also distributed copies of correspondence between me and Ms. Dickerson concerning administrative reorganization to the protesting students.

5. The rumor soon became current that I had destroyed Chicano Studies, this in spite of the fact that we still have a major and about 30 courses in the current catalogue. This I lay at Dr. Lux' door because of the distortation[sic] he propograted [sic].

6. Not long after this, the 45-50 activist Chicano students occupied my office, 41 of whom had to be removed by the State Police. They demanted [sic] hat I, Dr. Sanchez, Dean McGahan and one other administrator resign and among other things that the former administration of Title III be restored—i.e. that Dr. Lux be given free rein.

7. After several earlier meetings, the Regents met the day before yesterday to attempt to resolve many problems. At the meeting, Dr. Lux made a vicious attack on me and on my efforts to make Title III responsible. I am enclosing a newspaper account in order thay [sic] you may have some objective picture of the situation which is extremely complex. At the meeting I made the statement that I would again call Ms. Dickerson in the morning to try to get an answer.

8. The following morning (yesterday) Ms. Dickerson called me concerning my budget requests and gave partial approval. Coincidence? Possibly. But based on my experience with Dr. Lux, I am morally certain, that he called her—I had tried earlier to call her a number of times but she was always in conference. You may wonder why I don't terminate Dr. Lux. He is a tenured member of the faculty and has a contract as an administrator. Experience has shown us that when a champion of militant dissidents is terminated the court battles and intra-university hearings are so traumatic that it is better to live, at least for the rest of the year, with a bad situation.

Assuming, but not deciding, that these statements impugned plaintiff's good name and reputation, they still cannot form the basis of a claim because they were not made public. "A communication which is not made public 'cannot properly form the basis for a claim that petitioner's interest in his "good name, reputation, honor or integrity" was thereby impaired.' Bishop v. Wood, 426 U.S. 341 . . . (1976)." Lyons v. Sullivan, 602 F.2d 7 (1979). The communication between Angel and two of the Regents was obviously made in furtherance of Angel's duty of keeping them informed of conditions at the university. The

Regents definitely had an interest in receiving the information to aid them in making necessary decisions concerning the governance of the university. It is readily apparent from the nature of the subject matter and the candidness of the statements that they were made in confidence. Likewise, the draft of the letter given by Angel to the Academic Dean concerned matters in which both had an interest as part of their duties as administrators. The relationship of the personal secretary to the chief administrative officer of such an institution as the university is that of principal and alter ego and it is implicit in such a relationship that all communications are confidential. These statements did not impair plaintiff's "liberty" interests because they were not made public, and so could not affect plaintiff's reputation or employability in the community.

Examining next the "free speech" issue: this involves the statement read by plaintiff to the Board of Regents at their meeting of October 15, 1973. We quote it in its entirety because it does not lend itself to being condensed.

> (Speech Before New Mexico Highlands University Regents, October 15, 1973).
>
> Gentlemen: One year ago I briefly addressed the New Mexico Highlands faculty at its first meeting of the academic year and stated that I intended to determine for myself whether or not the Angel administration truely [sic] represented scholarship and academic excellence. Now, because of what I have witnessed in the last fifteen months, I can assert that this university—THE POLITICAL UNIVERSITY PAR EXCELLENCE—precludes any such possibility. Intellectual dishonesty and hiprocracy [sic] that characterizes it are self-indicting. The example of the suppression of Ethnic Studies is not untypical.
>
> Despite dogmatic statements to the contrary we do not have an Ethnic Studies, which includes Chicano Studies, Department; we do not even have the nascent program efforts of last year. All that remains is a major on the books and the regular courses offered by various departments that can count as electives. *Academic advisement, program planning and implementation, cultural heritage are all eliminated, while every other arrangement in Title III*

functions except Ethnic Studies. This is all so unneccessary because the funding is there—it has been since last June! The Ethnic Studies program is budgeted for nine full-time staff and we would have them if this administration would cease its unconscienceable [sic] impoundment of funds.

Our former friends in the Office of Education have been appalled by all of this. These are people who want very much to see Highlands succeed and who are now extremely disappointed with all of this political mess. Highlands was scheduled for $3-4 million out of the advanced Title III money over the next three years. Because of the inept clumsy machinations that have characterized this administration since June, I doubt seriously that any money will be forthcoming. Then *who* will be hurt? All the minorities hired on soft money which the administration so proudly waved before the LUSC last week. If anyone here doubts what I am saying, I suggest we call in the program auditors of the Office of Education and begin an audit.

The multi-cultural cop-out is another way for apologizing for incompetence and a lack of professional ability. Or was professionalism ever the real objective? Actually, to seriously educate young citizens in the societal values of all cultures was no more than a gimmick to divert attention. What Las Vegas *has* prescensed [sic] in the last two years, with Highlands as the basis for patronage, is the establishment of a second political machine. Composed of two basic types: psuedo-intellectuals (actually hack politicians), and supposed bleeding-heart WASPS who in reality are street walkers who have prostituted themselves and whatever scrupples [sic] they might have had to play token Anglo. This conglomerate has determined to consolidate political controls through absolute stifling of dissent and regimentation that would evoke envy in the Kremlin. To just stand here before you placed Pedro Rodriguez' job in jeopardy last summer. Two of you just after he dared talk to you received that scathing and unprovoked attack by the president. And now where is Rodriguez?

All the while pious pronouncements and promises emanate from the institution in an attempt to win the

respect of the community. If this administration is not respected—it is *because it has not earned it.*

This community cannot forget that it came to a regents meeting last summer and asked that the Highlands administration resolve its internal problems. But insensitivity prevailed and the issue was tabled. Now, Highlands' fanny is in the fire and it seeks community sanction for its *fascistic* actions. But community confidence is destroyed. And it will take more than an *Optic* photo of four grinning clowns on bicycles to re-establish it.

This lack-luster administration has distinguished itself by its incredible mediocrity. It is morally and ethically bankrupt! It is incumbent on you gentlemen, out of deferrence [sic] to the taxpayers of New Mexico, to see that Highlands is returned to respectability. Gestapo tactics and intransigence will not resolve anything, but only engender further violence. And I predict that this irrational and close-minded attitude of the administration and its high-handedness has put us on the verge of making Las Vegas the Wounded Knee of the southwest.

The law relating to "free speech" has been set forth by the Supreme Court.

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' " Perry v. Sindermann, 408 U.S. 593 (1972).

However, for a comment to be accorded constitutional protection it must be upon matters "of legitimate public

concern." Pickering v. Board of Education, 391 U.S. 563 (1968). Plaintiff's comments were not made to the public, and only one sentence in plaintiff's speech related to administration of the Title III program at Highlands University. Rather than discussing the Title III program, which might have been a matter of legitimate public interest, plaintiff engaged in vituperation and personal vilification of "the Angel administration." Such a diatribe did not serve to foster rational discourse, exchange of ideas, and meaningful discussion about a matter of legitimate public interest, and it is these functions that "free speech" protections are intended to foster.

The factual situation is not too unlike that in Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972).

> Clark construes too broadly the extent of his First Amendment rights and thus slights the interest of the State in providing its educational services according to policies it deems proper... His disputes with his superiors and colleagues about course content and counselling were not 'matters of public concern' and involved Clark as a teacher rather than as an interested citizen... Further, Clark has cited no sound authority for his proposition that he had a constitutional right to override the wishes and judgment of his superiors and fellow faculty members. . . .
>
> . . . .
>
> But we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution. First Amendment rights must be applied in light of the special characteristics of the environment in the particular case.

Because plaintiff failed to establish a deprivation of a protected liberty interest, he consequently failed to establish a right to a termination hearing for that reason. Plaintiff contends nonetheless that he was entitled to a termination hearing because of the provisions of the Employment Contract. We do not agree. The pertinent provisions of the contract reads as follows:

> *Regulations concerning Tenure of faculty members of New Mexico Highlands University.*

I. The following tenure regulations are for the purpose of stabilizing the teaching profession, insuring justice to the teaching faculty, securing the progress and welfare of the students, and safeguarding the interests of the supporting public of New Mexico Highlands University.

II. Termination for cause of a permanent appointment and of a temporary appointment or probationary appointment prior to expiration of a contract shall be considered by both a faculty committee and the Board of Regents. The faculty member facing possible dismissal shall, ten days before the hearing, be informed in writing of the charges against him and shall have the opportunity to be heard in his own defense by all bodies that pass judgment on his case.

As can be seen from the heading and these other provisions, these terms apply to the faculty members in their capacity as instructors. Plaintiff cites the case of Mr. William Jennings, who was dismissed from his position on the faculty and from his administrative position and was afforded a hearing upon request after his dismissal, as evidence for his contention that he was entitled to a pretermination hearing. We do not agree with plaintiff's contention. Mr. Jennings was entitled to a pre-termination hearing on his dismissal as an instructor and the Regents, by granting him a post-dismissal hearing, were merely rectifying the omission. Plaintiff was not dismissed from his position as a member of the teaching faculty. He was retained as a tenured professor, unlike Mr. Jennings. Secondly, Mr. Jennings requested the hearing; plaintiff did not.

The trial court erred in not granting defendant's motion for a directed verdict with regard to: The alleged deprivation of plaintiff's right to equal protection under the law; the alleged deprivation of plaintiff's liberty interest; and the alleged deprivation of plaintiff's first amendment rights. Accordingly, the trial court's judgment entered upon the jury verdict is

reversed with instructions to vacate the judgment and enter judgment for the defendant.

IT IS SO ORDERED.

s/ B.C. Hernández
Judge

WE CONCUR:

s/ Ramon Lopez J.

s/ Mary C. Walters J.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

WILLIAM R. LUX, *Petitioner,*	)	
-vs-	)	
FRANK ANGEL, *Respondent.*	)	No. 13,414

PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STEVEN L. TUCKER

JONES, GALLEGOS, SNEAD & WERTHEIM, P.A.
P.O. Box 2228
Santa Fe, N.M. 87501
(505)982-2691

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PETITION FOR WRIT OF CERTIORARI

COMES NOW the petitioner, WILLIAM R. LUX, by and through his attorneys, JONES, GALLEGOS, SNEAD & WERTHEIM, P.A., and pursuant to Article VI, §3, Constitution of New Mexico, and Rule 28, Rules of Appellate Procedure, hereby petitions the Supreme Court of New Mexico to issue its writ of certiorari to the Court of Appeals of New Mexico, and as grounds therefor states:

I.
DATE OF DECISION

The Decision of the Court of Appeals sought to be reviewed (Exhibit A hereto) was entered on November 18, 1980.

II.
QUESTIONS PRESENTED FOR REVIEW

1. In a civil rights action under 42 U.S.C. §1983, was it proper to reverse a judgment entered on a jury verdict in favor of plaintiff on the grounds that a prepared speech by plaintiff to a state university board of regents, given at the request and direction of the university president, was not conduct protected by the First Amendment to the Constitution of the United States or Article II§17, Constitution of New Mexico, as a matter of law?

2. In a civil rights action under 42 U.S.C. §1983, was it proper to reverse a judgment entered on a jury verdict in favor of plaintiff on the equal protection issue where there was evidence to support the jury's verdict on this issue?

3. In a civil rights action under 42 U.S.C. §1983, was it proper to reverse a judgment entered on a jury verdict in favor of plaintiff on the liberty issue on the grounds that the stigmatizing statements made by defendant about plaintiff were not made public where (a) defendant made no proper objection on this issue at trial and (b) there was evidence to support the jury's verdict on this issue?

III.
FACTS MATERIAL TO THE QUESTIONS PRESENTED

This is an action by petitioner, a former Assistant Academic Dean and Director of Title III at New Mexico Highlands University (N.M.H.U.). His complaint was brought under 42

U.S.C. §1983 and alleged that the university President, Frank Angel, terminated him in those capacities in violation of his constitutional rights as follows:

(1) by terminating plaintiff because of his exercise of his First Amendment right of freedom of speech;
(2) by terminating plaintiff without affording him notice and a hearing which had been afforded to another person in a comparable situation, thus depriving plaintiff of equal protection of the laws;
(3) by making damaging statements about plaintiff in connection with the termination, without giving plaintiff a hearing to rebut those charges, thus depriving plaintiff of liberty without due process of law.

After a 16-day jury trial at which 22 witnesses testified, the jury returned a general verdict in favor of plaintiff and against defendant Angel in the sum of $36,100. From that verdict, defendant Angel appealed. The Court of Appeals decided that the trial court erred in *not* directing a verdict in favor of defendant Angel on all three of plaintiff's claims and directed the entry of judgment in favor of defendant Angel.

Petitioner submits that the trial court properly declined to direct a verdict on plaintiff's claims because there was ample evidence and law to support each of them. The facts essential to the issues here presented are as follows:

Petitioner was first employed at New Mexico Highlands University in 1971 as a teacher of Southwestern history. (3 Rice 587, 591; Plaintiff's Ex. 37A). Although the normal probationary period prior to receiving tenure was 3 years and the maximum allowable credit from other institutions was normally 2 years, Dr. Lux was granted tenure after his first year at New Mexico Highlands University by the Board of Regents. Also, during his first year at N.M.H.U., Dr. Lux was nominated and voted Outstanding Professor of the Year by his department and by the administration. (3 Rice 654).

In the fall of 1971, in connection with and in addition to his work in the history department, Dr. Lux assisted with the preparation of a proposal for a federal grant for the cultural heritage program at N.M.H.U. With the assistance of Dr. Lux,

among that of other people, (3 Rice 621-622, 627-628), N.M.H.U. received a federal grant of $675,000.00 for the 1972-1973 school year, which, at that time, was the largest Title III grant that the federal government had ever made in the entire United States. (2 Rice 266-267; Plaintiff's Ex. 15). As a result of his efforts, the plaintiff was approached by the administration to become Assistant Academic Dean, which offer Dr. Lux accepted, and he was employed in the dual capacity of Assistant Academic Dean and Associate Professor of History for the summer of 1972 (Plaintiff's Ex. 38) and for the 1972-1973 school year. (3 Rice 621; Plaintiff's Ex. 39). Dr. Lux was also made Director of Title III programs at Highlands. (3 Rice 625; Plaintiff's Ex. 39; Defendant's Ex. 6).

The grant for the 1972-1973 school year was actually the first year of a three year project from 1972 through the 1974-1975 school year. (2 Rice 274-275; Plaintiff's Ex. 15, 17). The grant terms and conditions define the "Project Director" as "the person responsible for directing the project of the grantee [N.M.H.U.]." (Plaintiff's Ex. 16, p. 1). The Grant Terms and Conditions also contain the following provision:

> *CHANGES IN KEY PERSONNEL.* The Project Director and other grant personnel specified by name in the proposal are considered to be essential to the work being performed. If for any reason substitution of a specified individual becomes necessary, the grantee shall provide timely written notification to the grants officer. Such written notification shall include the successor's name with a resume of his qualifications.
>
> (Plaintiff's Ex. 16, p. 5).

The Project Director for this 3-year grant was designated to be Dr. Lux. (2 Rice 274, Plaintiff's Ex. 17).

Plaintiff's principal contact with the United States government in Washington, D.C., for administration of this grant was Ms. Audry Dickerson, who was Program Manager or Branch Chief of the Division of College Support at the Office of Education. (2 Rice 262). This Title made her "second in command" for the Title III programs across the United States. (2 Rice 264). Ms. Dickerson testified that Dr. Lux was instrumental in developing the proposal which resulted in the 3-year grant, that "we had

great deal of respect for Dr. Lux's knowledge," that she had "an excellent relationship" in her contacts with the plaintiff and, generally, that Dr. Lux was "quite capable of performing as grant Director of Title III." (2 Rice, 286, 289, 327-329).

The first year of the grant passed with no unusual problems. However, from the beginning of the 1973-74 school year, the administration (principally Dr. Angel) took the position that N.M.H.U. should depart from the federally-approved budget and implement its own program. Dr. Angel proposed to depart from virtually every item from the type of personnel to staff the programs to the programs to be offered; only the total amount being spent was unchanged (3 Rice 646-649, 665-667; 1 X. 8-12; Plaintiff's Ex. 54). Dr. Lux tried to remind Dr. Angel of the requirements of the federal program, that certain National Teaching Fellowships had to be awarded to staff the various ethnic studies programs for the fall of 1973, and that failure to abide by the grant terms could jeopardize the grant and the programs (3 Rice 649-650, 665-669; Plaintiff's Ex. 50). Nevertheless, Dr. Angel consumed several months negotiating with Washington to make the federal program conform to his own. (2 R. 279-281, 287, 288-289; 3 Rice 646-648; Plaintiff's Ex. 21, 22, 23). As a result of this delay, the grant budget was "impounded" by Dr. Angel and the ethnic studies programs, which had, in effect, been "promised" to the Indian, Chicano and Black students, failed to materialize in the fall of 1973. (3 Rice 646-649, 665-669).

The inability to staff these three programs resulted in increasing student dissatisfaction which culminated in a student "takeover" of the administration building and, in particular, President Angel's office on September 25, 1973. (2 Rice 157-160, 3 Rice 681; Plaintiff's Ex. 11). Shortly thereafter, Dr. Lux was instructed by Dr. Angel to appear before the Board of Regents to report on the administration of the Title III program and to give an assessment of "what had been happening in the University in the previous months." (2 X. 362). Dr. Lux did appear at the October 15, 1973, board meeting and gave a prepared speech (Plaintiff's Ex. 31).

A full copy of the speech can be found in the Opinion of the Court of Appeals (Exhibit A) at pages 8-10.

Two days later, Dr. Angel wrote a draft of a letter to the Title III Director in Washington. (9 X. 1846-1847; Plaintiff's Exhibit 12B). In this letter, Dr. Angel identified Dr. Lux as the "behind-the-scenes-leader" of the group of "extremist Chicanos" who were making demands upon Dr. Angel, one of which being that Dr. Angel and certain other administrators resign and that "former administration of Title III be restored—i.e., that Dr. Lux be given free reign." (Plaintiff's Ex. 12B). Then, Dr. Angel referred to the speech by Dr. Lux two days earlier which he described as "a vicious attack on me," following which the defendant made this statement:

> You may wonder why I don't terminate Dr. Lux. He is a tenured member of the faculty and has a contract as an administrator. Experience has shown us that when a champion of militant dissidents is terminated the court battles and intra-university hearings are so traumatic that it is better to live, at least for the rest of the year, with a bad situation.
>
> Plaintiff's Exhibit 12B, p.5.

The testimony, not only of Dr. Lux but by Father Burke, one of the members of the Board of Regents, established that Dr. Angel was mistaken in his identification of Dr. Lux with any group of this nature. (3 Rice 653-657; 2 Rice 443). However, Dr. Angel felt very strongly otherwise.

In subsequent months, Dr. Angel assumed more and more control over the administration of the Title III program and, correspondingly, he relieved Dr. Lux of his authority. (3 Rice 668-672, 1 X. 12-41, Plaintiff's Exs. 48, 50, 51, 53, 55, 65). In May of 1974, this assumption of control by Dr. Angel resulted in a vote of "no confidence" in the President by the faculty of N.M.H.U. (1 X. 32-35; Plaintiff's Ex. 9A). Nevertheless, in August of 1974, Dr. Angel promulgated and implemented a reorganization of the Title III program whereby Dr. Lux was virtually stripped of all authority, retaining only his title, and the administration of the program was placed with a university-wide committee selected by Dr. Angel. (1 X. 33-41; Plaintiff's Exs. 9A, 48, 51, 54).

Dr. Lux continued to advise the administration when he felt

that the Title III requirements were being violated and attempted to prevent such violations. (Plaintiff's Exs. 50, 53, 58, 60A, 65, 66 and 67). Because of mishandling by the administration (2 Rice 317), the university was advised by Washington in June of 1975 that its grant for the 1975-1976 school year was reduced from $300,000 to $140,000. (Plaintiff's Exs. 18 and 19). In June of 1975, Dr. Lux once again tried to bring these problems to the attention of the Board of Regents, this time by a letter which again was highly critical of the administration's handling of the program. (Plaintiff's Ex. 65). On July 31, 1975, Dr. Angel informed Dr. Lux that he was terminated as Assistant to the President and Director of Title III, effective August 31, 1975. (Plaintiff's Ex. 69). Dr. Angel never provided Dr. Lux with any official reason for the action taken, any notice of charges, any hearing or any opportunity to defend his position. (1 X. 90-94).

Petitioner's equal protection claim was based upon the failure to afford him procedural due process in contrast to the treatment afforded an employee similarly situated, Mr. William Jennings.

Mr. Jennings held a contract in the 1971-1972 school year as a Director of Field Services and Assistant Professor in Health and Physical Education and, thus, was employed both in an administrative and teaching capacity. (Plaintiff's Ex. 6). Likewise, Dr. Lux held a contract in the 1974-1975 school year as Associate Professor of History, Director of Title III and Assistant to the President for Planning and Development and, thus, was employed both in administrative and teaching capacity. (Plaintiff's Ex. 8, 42A). Dr. Angel sent notice to Mr. Jennings terminating his administrative position only (Plaintiff's Ex. 3). Dr. Angel testified that Mr. Jennings was *not* terminated in his faculty position (9 X. 1745-1746). Likewise Dr. Lux received a notice from Dr. Angel terminating him from his administrative position although not from his faculty position. (Plaintiff's Ex. 69). However, in Mr. Jennings' case, Dr. Angel referred the matter to the Faculty Policy Committee in accordance with the provisions of Faculty Handbook on dismissal (9 X. 1971). A hearing before this committee was held for Mr. Jennings at which he was allowed to present evidence on his behalf, was assisted by counsel, had prior notice of charges, was allowed to cross-examine the witnesses against him, and was allowed to assert his position in a closing statement to the committee (1 Rice 215-216,

2 Rice 458, 464-465). Following an adverse determination at that level, Mr. Jennings was granted a hearing before the Board of Regents where substantially the same rights were afforded him (1 Rice 216-218).

In sharp contrast to the treatment given Mr. Jennings, Dr. Lux never received any hearing, either before the Faculty Policy Committee or the Board of Regents and, therefore, never received a notice of charges, opportunity to present evidence on his behalf or cross-examine witnesses against him, assistance of counsel, etc. (1 X. 90-94). This was the treatment received by Dr. Lux even though he had made the following complaint to the Board of Regents just six weeks earlier:

> I am concerned about the arbitrary manner in which I was dealt with, about the disregard (if indeed charges are being made) for due process, . . .
>
> Plaintiff's Ex. 65.

As for a valid basis for distinguishing between these two cases, the only evidence on the point supports the conclusion that Dr. Lux had a right to *greater* procedural protection than Mr. Jennings, not the other way around. Mr. Jennings was only on probationary status (Plaintiff's Ex. 6; 9 X. 1739). Dr. Lux was on permanent status (Plaintiff's Ex. 8). Mr. Jennings was non-tenured (9 X. 1739; Plaintiff's Ex. 6). Dr. Lux was tenured (Plaintiff's Ex. 8, 36).

The foregoing consists of the facts essential to this petition.

IV.
BASIS FOR GRANTING THE WRIT

The primary basis for granting the writ of certiorari in this case is to reconcile the decision of the Court of Appeals with certain well-established constitutional principles in the area of public employment, particularly the right to speak freely without fear of reprisal on the basis of the content of one's speech, the right not to be deprived of one's liberty without due process of law, and the right to equal protection of the laws.

The secondary basis for granting the writ of certiorari in this case is to reconcile the decision of the Court of Appeals with the two most firmly-rooted principles of appellate law in this jurisdiction, namely (1) issues not raised or considered at trial will not be considered on appeal and (2) a jury's resolution of factual issues will not be disturbed where there is substantial evidence to support it.

V.
ARGUMENT

For the second time in as many years, the New Mexico Court of Appeals has ruled that a judgment notwithstanding the verdict should have been granted to a college adminstrator in a suit by an employee under 42 U.S.C. §1983. In the first such case, *Jacobs v. Stratton*, ___ N.M. ___, ___ P.2d ___ (Ct. App. 1979), rev'd ___ N.M. ___, 615 P.2d 982 (1980), the Court of Appeals reached out and decided issues not presented by either party and, on certain points, simply substituted its judgment for that of the jury. This court granted certiorari and reversed the opinion of the Court of Appeals, but remanded for a new trial because the jury was not properly instructed on the issue of constitutionally protected conduct under the First Amendment to the Constitution of the United States. *Jacobs v. Stratton*, ___ N.M. ___, 615 P.2d 982 (1980). Similarly, in this case, the Court of Appeals reversed the trial court's (Judge Lorenzo F. Garcia) denial of defendant's motion for judgment notwithstanding the verdict on issues not presented either in the trial or appellate court and substituted its judgment for that of the jury on genuine factual issues.

This case arose from the termination of the plaintiff in his administrative capacity in August of 1975. Plaintiff brought suit under 42 U.S.C. §1983 alleging three causes of action. First, plaintiff claimed that his termination was the result of his exercise of his right of free speech on numerous instances, one of which being a speech given to the Board of Regents at the request and direction of Dr. Angel in October of 1973. Secondly, plaintiff claimed that he was deprived of the "liberty" of engaging in his chosen profession without due process of law because certain damaging accusations made against him by Dr. Angel in

connection with his termination without affording plaintiff any hearing to rebut those accusations. Finally, plaintiff claimed that by affording plaintiff any hearing rights to another similarly situated faculty member, Mr. William Jennings, but not to him, plaintiff was deprived of equal protection of the laws.

The Court of Appeals held that Defendant Angel was entitled to judgment N.O.V. on all three claims, reversed the judgment and directed the entry of judgment for Defendant Angel (See Ex. A). On the free speech issue, the Court of Appeals ruled that plaintiff's speech to the Board of Regents (which is quoted at pp. 8-10 of the Opinion of the Court of Appeals) was not upon matters of "legitimate public concern," as a matter of law, and that Defendant Angel was free to terminate Dr. Lux for giving that speech. On the equal protection claim, the Court of Appeals overlooked the conflict in the evidence and ruled, as a matter of law, that Mr. Jennings' situation was distinguishable from that of Dr. Lux because Mr. Jennings was terminated both as an instructor and as an administrator whereas Dr. Lux was terminated only in his administrative capacity. On the liberty claim, the Court of Appeals ruled that, assuming Dr. Angel's "statements impugned plaintiff's good name and reputation" (Op. p. 8) without providing Dr. Lux with a hearing to rebut those statements, no claim was proven because, as a matter of law, they were not made public.

A. *The Free Speech Claim.*

It should first be observed that Dr. Angel's position on the speech was *not* that it was so objectionable that he had a right to terminate Dr. Lux for what he said. Both at trial and on appeal (see Appellant's Brief in Chief, pp. 11-13, 25-27), Dr. Angel's position was that the speech was not the cause of termination. Indeed, in the Brief in Chief, Dr. Angel described the October 1973 speech as "the most dramatic exercise of Plaintiff's free speech rights . . ." (p. 11). It was, perhaps, "dramatic" but it was always recognized as within plaintiff's constitutional rights. The Court of Appeals should not have reversed the jury's verdict on this issue which was never raised.

Moreover, the speech was clearly within the realm of constitutional protection—either as a matter of law or, at the very least, as an issue for the jury to decide under proper

instructions. The jury instruction on this issue was as follows:

> The "right to free speech," as it relates to an individual means that he can, in private or public, write or orally express criticism of the administration or board of regents, or both, relating to the overall administration of New Mexico Highlands University.
>
> Instruction No. 7 (R. 260).

This instruction accurately reflects well-settled law and was not objected to as not accurately reflecting the law.

First, it is clear that one's statements are protected even though they are made in private and are critical of one's superiors. *Givhan v. Western Line Consolidated Sch. Dist.*, ___ U.S. ___, 99 S.Ct. 693 (1979). Indeed, a unanimous Supreme Court observed in that case (per Justice Rehnquist), that once the administrator

> opened his office door to petitioner, the principal was hardly in a position to argue that he was the "unwilling recipient" of her views.
>
> 99 S.Ct. at 696.

It is equally well-established that punishment for the *content* of one's speech is strictly prohibited by the First Amendment.

> [T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought free from government censorship. *The essence of this forbidden censorship is content control.* Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open."

Police Department of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (emphasis added), quoting with approval *New York Times v. Sullivan*, 376 U.S. 254 (1964).

In the *New York Times* case, *supra*, the Court went on to hold that this "profound national commitment" to the principle of freedom of speech includes the recognition that one's expression " . . . may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. See also, *Bond v. Floyd*, 385 U.S. 116 (1966); *Community-Service Broadcasting of Mid-America, Inc. v. Federal Communication Comm.*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc); *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977).

The *real* free speech issue in the case at bar was whether Dr. Lux was terminated because of the speech or because of alleged deficiencies in his performance. (See Brief in Chief, pp. iv , 11-13). Most of the testimony in the whole trial and all of the testimony on the First Amendment claim was directed at that issue. (Id.) By its verdict, the jury decided that issue in plaintiff's favor and, significantly, that finding was left undisturbed by the Court of Appeals.

The sole basis for the reversal of the free speech claim was the determination by the Court of Appeals that the speech by Dr. Lux was critical of "the Angel administration" instead of just the Title III program and that it was personal and " . . . did not serve to foster rational discourse . . ." (Op. p. 11). This is precisely the attempted "content control" which is "the essence of . . . forbidden censorship." *Police Department of Chicago v. Mosley, supra.*

Unless the decision of the Court of Appeals is reversed, then public officials will be highly insulated from criticism because their critics would have to fear that a court may not feel that their comments "did not serve to foster rational discourse . . ." (Op. p. 11).

> When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone . . . " Speiser v. Randall, 357 U.S. 513, 516, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. For "[t]he threat of sanctions may deter . . . almost as sanctions." NAACP v. Button, supra. 371 U.S. at 433.
>
> *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

The decision of the Court of Appeals seriously undermines the very essence of the right of free speech in a democratic society and must be reversed.

B. *The Equal Protection Claim.*

The Court of Appeals overturned the jury's verdict on the equal protection claim on the ground that Mr. Jennings was terminated both in his teaching capacity and in his administrative capacity whereas Dr. Lux was terminated only in his administrative capacity. (Op. p. 12). This ruling simply overlooks the evidence that Mr. Jennings, like Dr. Lux, was terminated only in his administrative capacity. (See Plaintiff's Exhibit 3 attached hereto as Exhibit B). Even Dr. Angel testified that Mr. Jennings was terminated only in his administrative capacity.

> Q. [by Mr. Wentworth] So it is your testimony that you did not terminate him in the P.E. department?
>
> A. [by Dr. Angel] No, I did not terminate him in the P.E. department, that's what I'm saying.
>
> Q. And the only teaching that he [Mr. Jennings] had any relationship at all with, was in the P.E. department?
>
> A. So far as I know, yes.
>
> Q. So since you didn't terminate him in the P.E. department, you didn't terminate him as a teacher, sir?
>
> A. I'm sorry a car went by when you were making—
>
> Q. Since you did not terminate him in the P.E. department, you did not terminate him as a teacher, did you say?
>
> A. Well, I did not terminate his faculty status, that's correct.
>
> (Tr. 9 X. 1745-1746).

At the very least, this testimony constituted evidence upon which the jury could have reasonably found that Mr. Jennings, like Dr. Lux, had been terminated in his administrative position and not his faculty position and that, therefore, the granting of hearing rights to Mr. Jennings under those circumstances while denying them to Dr. Lux resulted in a denial of equal protection of the laws.

C. *The Liberty Claim*

Plaintiff's "liberty" claim arises from Dr. Angel's damaging statements about him without affording him due process of law, i.e., a hearing at which plaintiff could have demonstrated that the damaging statements were untrue.

> Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.
>
> *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

The Court of Appeals did not disagree with or disturb the jury's finding that Dr. Angel did, in fact, impugn Dr. Lux's good name and reputation and that Dr. Lux was never afforded a hearing to rebut these charges. (Op. p. 8). However, the Court of Appeals overturned the verdict because there was no public dissemination of these statements.

First, it was clear that Dr. Angel never urged the trial court that the jury instructions should have contained this element of "public dissemination," never objected to the jury instructions because they lacked this element, never tendered what they considered to be proper jury instructions on this issue, never made any motions on this claim and never raised the issue in any way prior to the appeal. (See 4 Rice 11-13, Answer Brief pp. 19, 35-38). Accordingly, the Court of Appeals should never have reached or decided the issue. Rule 51(1)(i), Rules of Civil Procedure; *Gerety v. Demers*, 92 N.M. 396, 489 P.2d 180 (1978); *Terrell v. Duke City Lumber Co., Inc.*, 86 N.M. 405, 524 P.2d 1021 (Ct.App. 1974).

In the alternative, the evidence demonstrated that these charges were disseminated by defendant Angel to others. Plaintiff's Exhibit 10 was sent to Ben Roybal and Tom Wiley. (1 Rice 149). The defendant gave Exhibit 12B to Marritt McGahan and a person named "Mary" (6 X. 1075), and Plaintiff's Exhibit 30A to the members of the Board of Regents (2 Rice 1423-1427). In addition to this evidence, the jury was certainly entitled to infer from Dr. Angel's willingness to disseminate these types of charges and his vehemence against the plaintiff, that these charges would be likely to have reached more people.

This was an ample showing of public dissemination to support the liberty claim. *Wellner v. Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973).

CONCLUSION

Because the verdict should have been upheld on *all three* of plaintiff's claims, the judgment of the trial court should be affirmed. However, if the verdict can be sustained on any one of these three claims, it should likewise be upheld.

> The rule is that if the verdict in favor of a plaintiff is general in form and there is one count which is supported by the evidence and which is free from error, such verdict will be upheld.
>
> *Berger v. Southern Pacific Co.*, 144 Ca.App.2d 1, 300 P.2d 170, 172 (Cal.App. 1956).

See also, the twelve other cases cited in the Answer Brief at pages 11-12.

Accordingly, Dr. Lux respectfully requests this Court to issue its Writ of Certiorari to the New Mexico Court of Appeals, to reverse the decision of that court and to affirm the judgment of the trial court, granting plaintiff reasonable attorneys fees to be determined by the trial court. 42 U.S.C. §1988; *Jacobs v. Stratton*, ___ N.M. ___, 615 P.2d 982 (1980).

Respectfully submitted,

JONES, GALLEGOS, SNEAD & WERTHEIM, P.A.
Attorneys for Plaintiff-Appellee

s/ Steven L. Tucker
STEVEN L. TUCKER
Post Office Box 2228
Santa Fe, New Mexico 87501
(505) 982-2691

APPENDIX C

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

Monday, December 22, 1980

NO. 13,414

WILLIAM R. LUX,

Petitioner,

vs. Original Proceeding on Certiorari

FRANK ANGEL,

Respondent.

This cause coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 4285 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

s/ Rose Marie Alderete

Clerk of the Supreme Court of
the State of New Mexico

CERTIFICATE OF MAILING

It is hereby certified that on the 5th day of December, 1980, a true and correct copy of the foregoing Petition was mailed to counsel for the defendant, Michael Bustamante, Esquire, Ortega & Snead, Post Office Box 2226, Albuquerque, New Mexico 87103, by first-class mail, postage prepaid.

s/ Steven L. Tucker

APPENDIX D

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

WILLIAM R. LUX,	)	
Petitioner	)	Docket No. 13414
	)	Filed 1-2-81
vs.	)	
FRANK ANGEL,	)	
	)	
Respondent	)	

MOTION FOR REHEARING

COMES NOW the Petitioner, WILLIAM R. LUX, and pursuant to Rule 19, New Mexico Rules of Appellate Procedure, hereby moves for rehearing from this Court's denial of Petitioner's Petition for Writ of Certiorari and as grounds herefor states:

1. After denying a Petition for Writ of Certiorari, this Court may grant a Motion For Rehearing, reverse its prior denial, and grant such a petition. *Hayes v. Reeves*, 91 N.M. 174, 571 P.2d 117 (1977).

2. Petitioner respectfully submits that in denying Petitioner's Petition For Writ of Certiorari in this cause, which denial was entered on December 22, 1980, and a copy of which is attached hereto as Exhibit "A", this Court overlooked the following points:

A. The Court of Appeals has erroneously decided that a prepared speech given by a public university employee, at the request and direction of the University President was not a form of expression protected by the First Amendment to the Constitution of the United States or Article II, Section 17, Constitution of New Mexico, and that the jury should not even have been allowed to consider the issue.

B. The Court of Appeals reversed jury determinations on two of plaintiff's claims notwithstanding ample and specific

evidence to support the jury's verdict.

C. Unless reversed, the decision of the New Mexico Court of Appeals in this case seriously undermines the efficacy of the right of free speech in the State of New Mexico and the re-establishment of that right is a matter of great public interest in this State.

3. The legal authority in support of this Motion for Rehearing is contained in the Petition for Writ of Certiorari previously filed herein and is incorporated herein by reference.

JONES, GALLEGOS, SNEAD & WERTHEIM, P.A.
Attorneys for Petitioner

s/ Steven L. Tucker
STEVEN L. TUCKER
Post Office Box 2228
Santa Fe, New Mexico 87501
(505) 982-2691

CERTIFICATE OF MAILING

It is hereby certified that I did on the 2nd day of January, 1981, mail a copy of the foregoing Motion For Rehearing to Michael Bustamante, Esq., of Ortega & Snead, Post Office Box 2226, Albuquerque, New Mexico 87130, by first-class mail, postage prepaid.

s/Steven L. Tucker

STEVEN L. TUCKER

APPENDIX E

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, February 5, 1981

NO. 13,414

WILLIAM R. LUX,
Petitioner,

vs. Original Proceeding on Certiorari

FRANK ANGEL,
Respondent.

This matter coming on for consideration by the Court upon Motion for Rehearing of Petitioner, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that Motion of Petitioner for rehearing be and the same is hereby denied.

ATTEST: A TRUE COPY

s/ Rose Marie Alderete
Clerk of the Supreme Court of
the State of New Mexico

Office-Supreme Court, U.S.
FILED
JUN 24 1981
ALEXANDER L. STEVAS
CLERK

NO. 80-1844

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM R. LUX,
Petitioner,

v.

FRANK ANGEL,
Respondent.

RESPONDENT'S BRIEF-IN-OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

MICHAEL D. BUSTAMANTE
ARTURO G. ORTEGA

ORTEGA AND SNEAD, P.A.
Post Office Box 2226
Albuquerque, NM 87103
(505) 842-8177

Attorneys for Respondent

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III

Respondent's Statement of the Case

Respondent deems Petitioner's statement of the case to be misleading and woefully inadequate for the Court's purposes in evaluating the Petition for Writ of Certiorari. The following facts, found in the Transcript of Proceedings of the trial in this action are necessary for the Court to make an informed decision.

The Federal Title III Program was a multi-faceted effort aimed at bringing small institutions with heavy minority enrollment into the mainstream of culturally sensitive higher education in the United States. Development and implementation of Title III Programs were expected to have a profound influence on the character of institutions in curriculum, faculty staffing and educational philosophy. As such, the Title III Washington Office charged with dispensing funds looked for institutions with strong leadership potential from their presidents in order to assure that the institution would have clear guidance through foreseeably difficult transitional periods.

At New Mexico Highlands University, the Title III Program was structured to include a whole new series of academic courses in virtually all of the established departments of the university. The basic institutional problem faced by the university involved the enormous difficulties inherent in attempting to integrate the new program with the established academic curriculum and administrative scheme. There were serious questions concerning the limits of authority and

responsibility of the Director of Title III with regard to the creation and control of curriculum, staffing and budgeting for the institution. The entire process created considerable upheaval, controversy and concern within the Highlands University community.

The problem was exacerbated by the size of the Title III Program and grant at Highlands University. The Title III budget for the 72-73 school year was Six Hundred and Seventy-Five Thousand Dollars ($675,000.00). The state allocation budget was approximately Two Million Seven Hundred Fifty Thousand Dollars ($2,750,000.) Clearly, a new money injection of this magnitude into a small institution carried the potential or significant dislocation in the pursuit of institutional goals.

The Petitioner Lux was named as the Director of the Title III Program at Highlands University in June of 1972. He held the post until August 31, 1975. Because of the size of the grant, the Washington Title III Office required a full-time director, and Lux functioned primarily, if not exclusively, as an administrator throughout the time that he held the post. For the academic years 72-73 and 73-74, his salary was paid largely out of Title III funds budgeted for administrative support of the program.

Because of the academic orientation of Title III, the director of Title III was vested with the title and position of Assistant Academic Dean. The move was made to give the Title III Program high visibility within the schools administrative and academic structure. Lux held the title and position of Assistant Academic Dean and Director of Title III from June,

1972 until August, 1974, under successive one year contracts running from September 1, to August 31, of each year.

Lux was unable to get along with or function well with the Academic Dean and in the Spring of 1974, President Frank Angel, the Respondent, determined to move Lux in order to alleviate the problem with McGahan and also in order to keep a closer acquaintance with Lux and the Title III Program. In order to maintain the programs high visibility, he named Lux Assistant to the President for Planning and Development and Director of Title III. Lux held this post, which he viewed as a promotion, until August, 1975, under a contract with a term running from September 1, 1974 to August 31, 1975.

Petitioner Lux, thus, held high administrative posts within Highlands University. In his position as Director of Title III, the Petitioner was in daily contact with other high administrative personnel, including the Academic Dean and President Angel, the number two and number one positions in the administrative structure. The contact was so constant, in fact, that Respondent Angel came to feel it burdensome and intrusive, taking from his time and other duties as president of the university.

Lux obviously had a close and confidential administrative relationship, with Respondent Angel. The relationship was made even closer when Lux was made Assistant to the President for Planning and Development.

As the first spanish surnamed president of any four year institutions of higher

learning in the United States, the Respondent Angel was keenly interested in the success of the Title III program at Highlands University. Angel felt it necessary to take a more active role in the Title III Program because of his feeling that the budget of the program did not emphasize the Ethnic Studies component sufficiently, and because he felt that Lux needed help in administering the program.

Angel adjusted the budget to increase the amount of money to be spent in the ethnic studies area. The adjustments did cause Angel to experience some delay in getting Washington approval for the changes, even though the changes were under 10% for the budget year, a percentage normally viewed as too inconsequential to require Washington approval.

Throughout this time, the Petitioner Lux made no constructive attempts to work around the slight problem caused by Washington's delay in granting official approval to the revised budget, even though there were administratively proper--almost routine--methods of dealing with such problems available to him as Director of Title III.

Lux had experienced some difficulty in dealing with the faculty and department chairman in implementing the Title III academic program in conjunction with the standard curriculum. Angel attributed the problem to administrative immaturity on the part of Lux and in order to help the situation decided to add further support to the program through his participation.

Angel's intervention had little or no effect on Lux' style or efforts in

directing the program. Student dissatisfaction did rise and the presidents office was occupied by certain students on September 25, 1973. A meeting of the Board of Regents of the university was held on October 15, 1973. The Respondent Angel requested Lux, as Director of Title III and Assistant Academic Dean, to appear at the meeting and give a report on the program. In response to Angel's request to speak in his official capacity, Lux appeared and issued the statement quoted by the New Mexico Court of Appeals in its opinion. Lux v. Board of Regents of New Mexico Highlands University, N.M. , 622 P.2d 266 (NM App. 1980).

The remarks were clearly a direct attack on the administration of which Lux was a part. Just as clearly the remarks were aimed at Respondent Angel personally. Angel was initially surprised (that a high ranking administrator, the Director of Title III, would deliver such remarks in his official capacity). His surprise naturally turned to anger. In an attempt to identify and mollify the source of emotion that prompted Petitioner Lux to speak as he did, Angel took even more time to attend to the Title III program and Petitioner Lux.

In the Spring of 1974, Angel was the subject of a vote of no confidence issued by the New Mexico Highlands University faculty. The major problem leading to the vote was the continued festering of the Title III boil on the neck of the faculty body. Petitioner Lux had failed throughout his tenure as Director of Title III to successfully integrate the Title III Program into the University structure. Transcripts of the faculty meetings introduced

to the trial clearly indicate serious misgivings on the part of the faculty as to the role of Title III in the university curriculum and also clearly indicate mistrust of and apprehension over the Director of Title III as an office and a person. The Respondent Angel defended Lux and Title III vigorously.

Angel at this time determined that more faculty involvement in all phases of the Title III Program was necessary and desirable. Angel created a Title III Committee which was to aid in all phases of administration of the Title III Program. Petitioner Lux was appointed chairman of the committee. Certain members of the faculty comprised the remainder of the membership. The Title III Committeee came into active existence in early February, 1975. Lux, however, disagreed with Angel with regard to the necessity or advisability of establishing any faculty committee with the power or function of overseeing Title III administration. Lux' disagreement was strong enough that he in fact refused to attend the committee's meetings or participate in anyway in its proceedings, though he was the putative chairman of the committee and even though he was given every chance to actively participate.

Title III and the Petitioner Lux came under increasing scrutiny and outright attack from essentially all quarters of the campus community outside Respondent's office:

1. Students and employees of the ethnic studies component of the Title III Program requested that an audit be conducted of Lux' handling of Title III monies. The audit was carried out by an ad hoc

committee of students, faculty of persons from the university business office.

2. Angel had to intervene in favor of ethnic studies coordinators who complained that Lux refused or failed to give them accurate budget information concerning their own programs.

3. The faculty policy committee--Highland Universities equivalent of a faculty senate--conducted its own investigation of the status of Title III within the university. Its determination was that the Title III Program suffered from too little faculty input at all levels. The policy committee also determined that Petitioner Lux' directorship of Title III had been inappropriate and ineffectual in that the best interest of the Program and the University would be served by removing Lux as the director. The policy committee conveyed its findings to Angel in the Spring of 1975.

Petitioner Lux' problems as director came to a head when Angel discovered that Lux had sent to Washington a totally unauthorized document purporting to evaluate the Title III Program at Highlands University for the Washington office. Periodic evaluations were required by Washington of all Title III Programs, in order to determine the effectiveness of the programs funded. Angel determined to have the evaluation done by independent and external evaluators. Lux did not submit his document to the external evaluators for inclusion in their evaluation form. Rather, he sent a document directly to Washington. When received, the Washington office thought it was the university's official evaluation and it was surprised to receive

another evaluation some days later. Lux' document was negative and injurious to the Title III Program at Highlands University. Upon discovering Lux' action, Angel forbade him to send any further communications in his capacity as Director of Title III without Angel's prior approval.

In the face of this mounting pressure, Petitioner Lux retreated further and further from active participation in the Title III Program. From mid June, 1975 to the end of his contract period on August 31, 1975, Lux participated little, if at all, in his position as Director of Title III and Assistant to the President for Planning and Development. His retreat was so complete that he failed to prepare a budget proposal for the following school year for the Title III Program. The Title III Committee had to reconstruct a budget from source materials on an emergency basis in order to meet a submission deadline.

On July 31, 1975, Angel informed Lux he would not offer Lux another contract as Director of Title III and Assistant to the President for Planning and Development. Lux received his normal contract as a tenured member of the Highlands University faculty, where he teaches today.

In addition to the above, the testimony adduced at the trial of this matter, found in some 2,000 pages of prepared record, was as follows:

Dr. Leonard Salazar, an experienced and knowledgeable person in the field of higher education, and particularly in the evaluation of programs funded by the federal government at institutions of

higher education (X Tr. 484-96) testified that:

1. He came to Highlands University to evaluate its program in an independent and arms length manner. (X Tr. 516-17);

2. During his interviews he discovered that relationships between the heads of the subcomponents of the Title III program and its Director, Plaintiff Lux, were quite strained. (X TR. 512-13);

3. He found difficulties with the administration of the Title III program overall. (X Tr. 516-27, 540, 546-47);

4. He found and decided that Plaintiff Lux was not dealing well with the problems inherent in the Title III program on the Highlands campus. (X Tr. 518-27, 540, 546-47);

5. He recommended at a private exit interview with Defendant Angel that Plaintiff Lux not be continued in the position of Director of Title III. (X Tr. 499-500, 538-40, 546-47; Plaintiff's Exhibit 25);

Dr. Harold Zennick, the Acting Director of the Title III program for the 1975-76 and 1976-77 school years, testified that during the spring and summer of 1975, in his working with the Title III committee, he observed that:

1. Under Lux there was a total lack of budgetary control and management of the Title III program, with no information being supplied on a regular basis to the subcomponents of the Title III program. (X Tr. 687, 704-12);

2. That there was a total breakdown of communication between the Director, Plaintiff Lux, and the heads of the various subcomponents of the Title III program. (X Tr. 704-06);

3. Dr. Zennick, along with the rest of the Title III committee, recommended that Dr. Lux not be reappointed to the position of Director of Title III (X Tr. 714-15).

Dr. John Pacheco, who served as the head of the Ethnic Studies subcomponent of the Title III grant for a time in the 1974 school year, testified that he had severe problems with Lux and his style of administering the Title III program, including Lux' direct interference with Dr. Pacheco's work as a program director with regard to the development of courses and materials, and also Lux' unprofessional method of allowing personalities and personal grudges against various department heads to interfere with Dr. Pacheco's work and coordination with such departments. (X Tr. 606-08, 612, 737-38).

Dr. Merritt McGahan, testified:

1. That he was concerned and alarmed at Plaintiff Lux' style of administration in that it tended to place too much emphasis on edict and direction when the academic and political situation on the Highlands campus dictated a different approach to persuasion. (X Tr. 954-70, 986-87);

2. That Plaintiff Lux consistently disregarded normal channels of communication within the University, in particular bypassing department chairmen with regard to questions and decisions which required their input.(X Tr. 1015-17, 1029).

Dr. Sigfredo Maestas, the Academic Dean during the school year 1974-1975, testified that during a meeting of the Ethnic Studies coordinators, Lux, Angel and himself, he observed Lux directly refuse to obey an order given him by Defendant Angel concerning the provision of budgetary information to the Ethnic Studies subcomponents and with regard to the expedition of travel and expense reports (X Tr. 1159-67).

Maria Padilla, secretary to Petitioner Lux throughout the period of his Directorship of the Title III program at Highlands University, testified that:

1. During the spring and summer of 1975, Lux essentially absented himself from the New Mexico Highlands University Campus and his office (X Tr. 751-52);

2. That she had not seen or typed Defendants' Exhibit 6, the Director's Statement of Evaluation of Title III (X Tr. 748-49).

Defendant Angel himself testified that he decided in the latter days of July 1975 not to renew Petitioner Lux as Assistant to the President and Director of Title III, because;

1. Lux had on several occasions failed to follow orders from Defendant Angel issued in Defendant Angel's capacity as Chief Executive Officer of Highlands University;

2. Lux' refused to work with the Title III Committee;

3. Lux failed to provide the type of leadership needed to properly integrate

the Title III program into the mainstream of the University structure;

4. The Title III grant for the 1975-1976 school year had been cut further, and there would not be enough money to pay a full time director of the program out of the Title III funds;

5. A new president was coming to take over at New Mexico Highlands University on September 1, 1975, and Defendant Angel did not wish to impose on the new president any personnel, but rather wanted to give the new president the opportunity to exercise his right to pick his own assistants;

6. Defendant Angel took into account the recommendations from the external evaluators, Dr. Leonard Salazar, and the Policy Committee, not to continue Lux in the Title III position. (X Tr. 1607-13).

REASONS FOR REFUSAL OF THE WRIT

1. This case does not present the correct factual context for proper resolution of the questions Petitioner seeks to be reviewed.

The Petition seeks another statement by the Supreme Court on college faculty members First Amendment Rights. Assuming for the sake of argument only that such a review is necessary, this case is certainly not the proper vehicle for the analysis.

Petitioner ignores one crucial fact: Throughout the course of the events giving rise to this action, Petitioner Lux was employed, and was acting purely in his

capacity as, a highly placed administrator of Highlands University. The remarks which he delivered to the Board of Regents were not delivered as an interested citizen, or even as a faculty member, but as the Assistant Academic Dean and the Director in charge of administering the very program he was to comment on. Petitioner Lux was requested by Angel to speak at the October, 1973 Board of Regents meeting in an official capacity, as a spokesman for the university, the administration and the man he attacked.

It is not an overstatement to say that Petitioner's status as a faculty member of Highlands University was not only never questioned or affected by this case, but that it was irrelevant to the resolution of the issues in the case. For example, Petitioner Lux' non-renewal was only in his administrative positions as Assistant to the President for Planning and Development and Director of Title III. Petitioner even today retains his faculty position at Highlands University. The party's statements of the factual context contain no indication that Petitioner's status as a faculty member was considered by the parties or the lower court. All of the evidence dealt with his performance as a highly placed administrator.

It is not difficult to perceive that there is a significant difference between administrators as highly placed as Petitioner was and a faculty member qua faculty member. Petitioner was in a position which not only placed him in a close proximity and gave him ready access to the very nerve center of the university's governance, but also vested him with considerable discretionary and policy making powers in his

own right. In such a position, when Petitioner spoke, he spoke in a basic sense for the university. A faculty member is rarely in a position of such delicacy. Faculty members normally speak to or about the institution rather than for it. An institution's need to exercise considerable discretion over person's speaking for it is obviously different from the interests requiring protection when a faculty member speaks.

The considerations and policies which would control a First Amendment claim by an administrator such as Petitioner are of a different order from the considerations already dealt with at length in the Court's prior decisions on faculty First Amendment rights. It could well be that administrators such as Petitioner are governed by rules and considerations which are not even on a continuum with standards properly applicable to faculty members as such.

The Court should not grant a Writ in this case because it would necessarily be faced with questions and issues not urged by the Petitioner while attempting to resolve issues not found in the factual context of the case.

2. There is no conflict among the lower courts concerning the applicability of Pickering v. Board of Education, which requires resolution by this Court.

The Petitioner makes much of a purported conflict among the lower courts as to the proper application of the Pickering balancing test. This alleged conflict is supposedly caused by this Court's decision in Tinker v. Des Moines Independent

Community School District, 393 U.S. 503 (1969). A more discriminating examination of the cases reveals that there is no conflict at all, either between the lower court cases or between Pickering and Tinker.

Tinker, of course, involved the exercise of First Amendment Rights by high school students. There, certain students arrived at their high school wearing black arm bands. They were ordered to remove them under pain of disciplinary action. There was no showing of any adverse effect on school routine because of the students' activities. This Court held that in such circumstances, students' exercise of their First Amendment rights could not be curtailed unless substantial disruption or material interference with school activities could reasonably be expected to result from the activity.

Respondent does not argue with the holding of Tinker. However, Respondent does assert that there are significant differences between the status of students as opposed to government employees, including teachers. The differences are clearly even more marked when one considers highly placed administrators. It is much easier to frame and state a broad rule of conduct in student situations because the relationship of the student to teachers and administration does not vary significantly.

Pickering involved a high school teacher who wrote a letter to the editor critizing the school board's allocation of money between athletic and academic programs. The school board there made allegations similar to those found in Tinker that

Pickering's action would tend to foment controversy, conflicts and dissension among teachers, administrators and the board of education and the residents of the districts, and would also be disruptive of faculty discipline. The Court swept aside the board's undocumented fears and held that the teacher in that case should be treated as if he were a member of the general public.

It is true that Pickering did not take the further step that Tinker did in stating a requirement of material interference with school activities (though it is difficult to imagine that the court would allow minimal or immaterial interferences to allow curtailment of First Amendment Rights in such a situation). This "failure," however, is but an illustration of the genius of Pickering. The court in Pickering was acutely aware of the "enormous variety of facts and situations" which could be encountered in this area of human action. 391 U.S. at 569 It consciously, and wisely, determined not to lay down any general standards against which all teacher or other government employee statements could be measured. It is not difficult to imagine entirely plausible scenarios where teacher First Amendment activities could serve as proper grounds of dismissal, even in the absence of evidence of material disruption of school activities. Because of the teacher's position in the educational process and because of their responsibility to the students themselves, some First Amendment activities could be grounds for dismissal without causing a disturbance in terms of inciting violence or otherwise materially disturbing the normal working of the system.

The impropriety of setting standards in this area, in the sense that Petitioner is inviting the courts to do, has not lessened with the passage of time. In Arnett v. Kennedy, 416 U.S. 134 (1974), this court reaffirmed the balancing test of Pickering with laudatory language and also again recognized the futility and lack of wisdom of attempting to be too specific in laying strict rules and categories of protected and unprotected First Amendment activities. Pickering and Tinker are thus not at odds; they merely deal with distinct situations.

Neither are the lower court cases at odds. Certainly Petitioner fails to demonstrate the conflict he so baldly asserts. Petitioner describes not a single example of similar cases dealt with differently by the circuits cited. And, Respondent's reading of all of the cases cited in the Petition reveals no conflict whatsoever between them. Respondent perceives all of the cases cited by Petitioner to be merely appropriate applications of the Pickering balancing technique of decision making. Certain of the cases exhibit the influence of Tinker, but the influence exhibits itself only as an element of pure Pickering balancing. There is no example of similar cases dealing with the Tinker case differently. In fact, all of the cases cited by Petitioner cite Pickering approvingly and utilize the Pickering calculus, rather adroitly emphasizing such of the suggested elements as are appropriate to the particular fact situation.

For example, in Van Ooteghem v. Gray, 628 F.2d 488 (1980), the Fifth Circuit dealt with a county employee who was fired

because of a speech he planned to give on the civil rights of homosexuals. The speech was entirely unconnected with his employment. In such a case, the court applied Pickering and obviously found no governmental interest whatever in curtailing the speech. See also Downing v. Williams, 629 F.2d 612 (1980).

Petitioner's amazement at the observation that a single circuit can state more than one "standard" in its cases merely reveals that the Petitioner has failed to appreciate the excellent mechanics of Pickering.

Finally, Petitioner's citation and quotation of Stewart v. Bailey, 556 F.2d 281 (5th Cir. 1977) is unavailing to him. First, it is a 1977 case from the 5th Circuit, a circuit which Petitioner obviously feels has corrected its unprincipled ways in later cases such as Porter v. Califano, 592 F.2d 770 (1979). More importantly, it is clear that the quote from Stewart v. Bailey, given in the petition is merely a less eloquent restatement of Judge Goldberg when he wrote in Porter:

> . . . Pickering states that the First Amendment requires the government not just to show that certain employees speech injures the government, but to show that the benefits of preventing the injury actually outweigh the profound benefits of free speech in our society. 592 F.2d at 779.

This Court should not be lulled into accepting a task which it has twice before faced and rejected as impractical, if not impossible of resolution.

3. The New Mexico Court of Appeals opinion is correct and should be left undisturbed.

Stripped of the perhaps too artful language employed by the author of the opinion below, the operative holding of the New Mexico Court of Appeals is that the Petioner Lux speech was not protected in the particular circumstances of the case.

It is clear that the Court was fully aware of the facts in the case. In particular, it is clear that the Court fully appreciated that this case dealt with the acts and speech of a highly placed administrator qua administrator, and not a faculty member. For example, the court noted in its discussion of the equal protection claim that Lux was terminated only in his administrative post and not his faculty position. That distinction was crucial in its decision of the equal protection theory. Also, the court detailed the different titles Petitioner held throughout his time as Director of Title III. Finally, the court also printed Petitioner's contracts and noted that certain provisions thereof dealt only with his faculty position.

Thus, the Court of Appeals was cognizant that Respondent Angel requested Lux to report to the Regents about Title III at their October, 1973 meeting as the Director of Title III and Assistant Academic Dean. The court was not evaluating Petitioner's remarks as if made by a faculty member, but as made by a member of the higher administrative echelon of the university in his official capacity.

At this point, reference to the case of Clark v. Holmes, 474 F.2d 928 (1972) is instructive in diciphering the Court of Appeals thinking. The court below cited Clark in support of its decision on the speech claim. Clark involved a faculty member dismissed from his faculty position, primarily because of disagreements with the administration concerning curriculum and because of his activities in belittling other staff members to students. The court in Clark held that in light of the circumstances at hand, neither incident of First Amendment activity involved a matter of public concern and thus were not protected.

The Court of Appeals obviously felt that the disagreements Lux and Angel were having concerning Title III in the fall of 1973 were the equivalent of arguments concerning curriculum. Thus, as between high level administrators, the disagreements over the budget were matters of private concern and not a matter for public airing. In addition, the Court of Appeals clearly decided that the tone of the remarks were particularly inappropriate as between high level administrators. In light of the circumstances of the case, involving men in policy making roles and confidential administrative relationships, the Court obviously held that it was improper to publicly air differences of opinions in any manner, but it was particularly egregious and offensive in the intemperate and defamatory manner chosen by the Petitioner Lux. The Court of Appeals opinion cannot be held to be clearly erroneous under the circumstances of the case.

Respondent submits that the opinion below is well within the ambit of

Pickering, albeit perhaps not clearly articulated as such.

In addition, in the circumstances of this case, the Petitioner Lux remarks could be held to be unprotected on a theory analogous to the Supreme Courts "fighting words" doctrine. The "fighting words" doctrine is based on the idea that certain words come within the ambit of action rather than speech. There is no intellectual content to be conveyed to the listener but merely a provocative, emotional message intended and likely to incite an immediate response. Thus, in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) the court held:

> there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include . . . the insulting or 'fighting words' -- those which by their very utterance inflict injury or tend to incite a immediate breach of the peace. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality. 315 U.S. at 572-574.

In Chaplinsky, this court upheld a breach of peace conviction where the speaker described the city marshall to his face, as a "god damned racketeer and a damn facist." The New Hampshire breach of peace statute had been carefully drawn and

narrowly construed by the Supreme Court to do no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee. See State v. Chaplinsky, 91 N.H. 310 18 A.2d 754 (1941).

In addition, the Chaplinsky court adopted the test for "fighting words" as articulated by the Supreme Court of New Hampshire;

> The test is what men of common intelligence would understand would be words likely to cause an adverse addressee to fight. . . the english language has a number of words and expressions which by general consent are fighting words when said without a disarming smile. 91 N.H. at 320-321.

A variation of the "fighting words" doctrine was applied in Feiner v. New York, 340 U.S. 315 (1951). In Feiner, the speaker addressed a hostile audience of approximately 75 to 80 black and white people. The address included offensive descriptions of the city mayor and President Truman, and called on blacks to "rise up in arms and fight for equal rights." 340 U.S. at 330. After one person In the audience threatened violence, the police arrested Feiner and he was convicted under the state disorderly conduct statute.

Upholding the conviction the Court held:

> the offense known as breach of peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. 340 U.S. at 320, quoting Cantwell v.

Connecticut, 310 U.S. 296, 308 (1940).

In the present case, no breach of peace statute is involved. Rather, the Court is faced with a situation where a highly placed administrator launched a vehement and defamatory attack against the administration of which he was a part in a situation where he was acting in his official capacity. The remarks contained several words, phrases and accusations which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It is clear that the words of the speech were directed at the Highlands administration generally, and the Respondent Angel specifically. Further, at a minimum, certain segments of the audience were hostile in view of the take over of the president's office by militant students only a month before.

Because of the hostile audience, and Petitioner's position vis-a-vis the persons and entities he was attacking, Petitioner's words, under the circumstances were "likely to product violence in others." Consequently, Petitioner's remarks must be considered "fighting words," and not protected under the First Amendment.

4. This case is inappropriate for review because there are adequate non-constitutional bases for decision.

From its earliest pronouncements, the Supreme Court has adhered to the salutary rule of strict necessity in disposing of constitutional claims. This rule has found application on a jurisdictional

basis in the formulation of the courts refusal to render advisory opinions and in application of the related jurisdictional policy drawn from the case and controversy limitation. U.S.Const. Art. III; Muskrat v. U.S., 219 U.S. 346 (1911). As noted in Rescue Army v. Municipal Court of City of Los Angeles, 331 U.S. 541 (1947),the policy has not been limited to jurisdictional determinations. The Court has also developed another series of rules under which it avoids passing upon constitutional questions when not necessary to do so in the resolution of a particular case.

Applicable to the case at bar, is the rule that if a case can be decided on either of two grounds, one involving a constitutional question, and the other involving a question of general law, the court will decide only the latter. Siler v. Louisville and Nashville RR Co., 213 U.S. 175 (1909); Light v. U.S., 220 U.S. 523 (1911).

In Rescue Army v. Municipal Court of City of Los Angeles, supra, the Supreme Court made it clear that the rule of strict necessity is not merely procedural nor a rule of convenience. Rather, the court described the rule as one of substance grounded in the same ultimate foundations which sustained the jurisdictional case and controversy limitation. The rule of strict necessity was seen by the Court in Rescue Army, supra, as being a rule basic to the federal system and the Supreme Courts appropriate place within that structure. In line with the rule of strict necessity, this court should not issue a Writ in a case most easily resolved on non-constitutional grounds.

At the beginning of this Brief in Response to the Petition for Writ of Certiorari, Respondent provided the Court with as terse a summation as possible of the facts involved in this action. This explanation was necessary to demonstrate the many legal issues raised by the facts. If the Court to grants a Writ, Respondent is confident that upon exercising its independent review of the entire record as required in Old Dominion Branch #496 v. Austin, 418 U.S. 264 (1974), the Court shall be convinced that the proper resolution of the case is a holding either that the remarks made by the Petitioner Lux at the October 15, 1973 meeting were not a substantial or motivating factor in his non-renewal some 22 months later, or that the Respondent Angel has established his Mount Healthy defense. Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

In addition, the Respondent in the trial court and in the Court of Appeals of the State of New Mexico urged several grounds for reversal of the jury verdict based on the trial courts profound error in its instructions to the jury on Plaintiff's First Amendment claims. Respondent is comfortable in asserting that each of the non-constitutional grounds explained herein are proper, and represent the easiest and most appropriate means of resolving the real issues presented by this case.

The Supreme Court should not, and cannot, spend its valuable time reviewing cases which are most appropriately resolved on non-constitutional bases.

CONCLUSION

By any of the normal standards used by this Court in determining the propriety of discretionary review, this case does not present any issues requiring resolution, or perhaps capable of resolution, by this Court, and the Petition for Writ Certiorari should be denied.

Respectfully submitted,

ORTEGA AND SNEAD, P.A.

By_____
MICHAEL D. BUSTAMANTE

By_____
ARTURO G. ORTEGA
Post Office Box 2226
Albuquerque, NM 87103
(505) 842-8177

Attorneys for Respondent

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CLERK

No. 80-1844

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

William R. Lux,
Petitioner,

v.

Frank Angel,
Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF-IN-OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JERRY WERTHEIM
STEVEN L. TUCKER
JOHN WENTWORTH

JONES, GALLEGOS, SNEAD
& WERTHEIM, P.A.
Post Office Box 2228
Santa Fe, New Mexico 87501
(505) 982-2691

Attorneys for Petitioner

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III. PETITIONER'S REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's Statement of the Case consists of a summary of the evidence supporting his position that Petitioner was terminated, not because of his speech on October 15, 1973, but because of perceived problems in the performance of his duties. This issue of causation was defined in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and is referred to in the Petition for Writ of Certiorari as "the Mt. Healthy issue." (Petition at 11, n. 6).

This case is the appropriate vehicle to address the Questions Presented For Review, as stated in the Petition, because there is no Mt. Healthy issue to obfuscate the resolution of the fundamental First Amendment issues presented here. By its verdict, the jury resolved the Mt. Healthy issue in favor of the Petitioner, *i.e.*, it found that Petitioner was indeed terminated for exercising his constitutional right of free speech as opposed to the reasons advanced by the Respondent. The New Mexico Court of Appeals did not disturb that finding in favor of Petitioner or even address it. Rather, the court assumed that plaintiff's performance was at least adequate and that his performance furnished no justification for termination, but found that the speech of October 15, 1973, was unprotected conduct for which Petitioner could properly be terminated. Therefore, this Court need not consider the Mt. Healthy issue which was not even passed on by the lower court. That issue has no place in the context of this Petition.

In addition to the fact that the Mt. Healthy issue was improperly raised by the Respondent, Respondent takes the liberty of expounding his view of the evidence in the light most favorable to his position. Even if the issue were appropriate here, the standard for reviewing the failure of the trial court to direct a verdict for Respondent is whether there was any evidence or inference from which the jury could have arrived at its verdict in favor of Petitioner, viewing all the evidence in favor of Petitioner. (Petition at 11, n. 7). In the event the Court should deem it appropriate to review the evidence on this issue, Petitioner has summarized the evidence on the Mt. Healthy issue in the Petition at pages 8 through 10. That evidence clearly supports the jury's verdict on this issue.

There is one representation of fact made in Respondent's Brief-In-Opposition (pp. 5, 13) to which Petitioner must respond. Respondent suggests that Petitioner was directed to give the October 15, 1973, speech "as a spokesman for the university, the administration and the man he attacked." *Id.* at 13. Aside from the mischaracterization of the speech as an "attack" on anyone, there is no evidence whatsoever that Petitioner was directed to act as the "spokesman" for anyone or anything other than for himself and his own ideas. He was directed to speak to the Board of Regents and the President and to give his own views on "what had been happening in the university in the previous months." (2 X 362). At trial, Respondent testified that Petitioner "had every right to speak on whatever subject he wanted to, or criticize me or do whatever he wanted to." (9 X 1859). Respondent's current position is not only unsupported by the evidence but contradicted by his sworn testimony.

IV. PETITIONER'S REPLY TO RESPONDENT'S REASONS FOR REFUSAL OF THE WRIT

A. This Case Presents the Ideal Context for Addressing and Resolving the Questions Presented for Review.

Respondent's first argument is that the Court should not address these issues in the context of this case because Petitioner was terminated from his administrative position rather than from his teaching position. Respondent's characterization to the effect that Petitioner "was employed, and was acting purely in his capacity as" an administrator (Respondent's Brief-In-Opposition, pp. 12-13) is not supported by the record. During the 1973-1974 school year, Petitioner was employed as "Assistant Academic Dean (Director of Title III) Associate Professor of History" (Plaintiff's Exhibit 41). It is not uncommon for faculty of institutions of higher learning to be employed in more than one capacity. While the particular position or positions one holds is not irrelevant to the free speech issue, each case must be examined on its own facts to apply the proper standard. There is no black-and-white demarcation between teachers and administrators to justify different standards in each case. Indeed, the lower courts have attempted to apply either the standard as defined in *Pickering v. Board of Education*, 391 U.S. 563 (1968), or in *Tinker v. Des Moines Independent Community School District*, 393

U.S. 503 (1969), or both, to school teachers,[1] school administrators,[2] persons holding dual positions as teachers and administrators,[3] university security personnel,[4] a psychiatrist at a state hospital,[5] an assistant county treasurer,[6] an employee of a federal program,[7] and an administrative assistant of a state manpower agency,[8] just to name a few.

The reason for granting the Petition is that the standard applicable to the free speech rights of faculty, whether teachers or administrators, has never been clearly defined by the Court, notwithstanding the decisions in *Pickering* and *Tinker*, resulting in the application of various standards by the lower courts, as shown by the decision of the lower court in this case. Thus, the necessity for granting this Petition in this case is not lessened by the particular position or positions the Petitioner held at the time he gave the speech.

B. CONFLICTS AMONG THE LOWER COURTS HAVE ARISEN IN THE ABSENCE OF A DEFINITIVE DECISION BY THIS COURT ON FUNDAMENTAL PRINCIPLES IN THIS AREA.

Respondent's argument on this point serves to illustrate and support Petitioner's position rather than defeat it. Respondent urges that the "genius of *Pickering*" lay in the Court's "determin[ation] not to lay down any general standards against which all teacher or other government employee statements could be measured." (Respondent's Brief-In-Opposition, p. 16). Apparently, Respondent feels that the "genius of *Pickering*" is that it set not even general standards but left the issue of free speech open to subjective determination on a case-by-case basis. Consider the following two statements by Respondent (Brief-In-Opposition, p. 16), nearly in sequence:

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[1] *Adamian v. Lombardi*, 608 F.2d 1224 (9th Cir. 1979); *Hastings v. Bonner*, 578 F.2d 136 (5th Cir. 1978).

[2] *Washington v. Board of Education*, 498 F.2d 11 (7th Cir. 1974); *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

[3] *D'Andrea v. Adams*, 626 F.2d 469 (5th Cir. 1980).

[4] *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), *cert. denied*, __ U.S. __, 49 U.S.L.W. 3910 (1981).

[5] *Downing v. Williams*, 624 F.2d 612 (5th Cir. 1980).

[6] *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980).

[7] *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979).

[8] *Yoggerst v. Stewart*, 623 F.2d 35 (7th Cir. 1980).

> [I]t is difficult to imagine that the court [sic] would allow minimal or immaterial interferences to allow curtailment of First Amendment Rights in such a situation. . . . It is not difficult to imagine entirely plausible scenarios where teacher First Amendment activities could serve as proper grounds of dismissal, even in the absence of evidence of material disruption of school activities.

Respondent apparently suggests that the proper standard lies somewhere between demonstrating a "minimal or immaterial interference" with school activities and a "material disruption of school activities." Yet Respondent cannot identify such a standard or supply any authority for it. The lower court went even further by finding Petitioner's conduct to be unprotected without finding any evidence of even minimal interference with school activities. Both Respondent and the lower court reflect examples, albeit extreme, of the exodus from the basic First Amendment principles such that no objective or identifiable standards are left.

Respondent does not recognize the *Tinker* case as providing any guidance for the conduct of faculty on the grounds that students must be distinguished from teachers. Respondent simply ignores the language from the *Tinker* opinion (quoted in the Petition, p. 19) outlining the First Amendment rights of *teachers and students*. Respondent also chooses to ignore the statement in the Petition (p. 21), supported with citations, to the effect that a probable majority of the lower courts apply the *Tinker* "material and substantial disruption" standard to employee cases generally and teacher cases specifically. Petitioner stands on the discussion in the Petition demonstrating the conflict among the lower courts on this issue.

As recently as June 8, 1981, Justice Rehnquist recognized a conflict among the lower courts on "the so-called *Pickering* defenses" in a case involving the termination of a university security officer. In *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), the court held that evidence of the *Pickering* defenses was properly excluded because it viewed the evidence as presenting no factual issues for the jury to decide. The defendant sought a Writ of Certiorari to review that issue, among others, but the Court denied the petition. *Saye v. Williams*, __U.S. __, 49 U.S.L.W. 3910 (1981). Justice Rehnquist dissented, citing an apparent inconsistency among the lower courts in applying the *Pickering* defenses to public employees.

Id. Because this Petition presents a more concrete and more common context for the resolution of this conflict, the Court should seize the opportunity presented by this Petition and should elucidate the proper interpretation of its 1968 decision in *Pickering* as well as its 1969 decision in *Tinker.*

C. THE OPINION OF THE NEW MEXICO COURT OF APPEALS WAS NOT PROPERLY DECIDED.

Respondent argues that the Opinion of the lower court employed "perhaps too artful language" and was "perhaps not clearly articulated" (Respondent's Brief-In-Opposition, pp. 19, 21), but that the case was correctly decided. Petitioner submits that the basis for the decision of the lower court was, as it said, because Petitioner's speech "did not serve to foster rational discourse, exchange of ideas, and meaningful discussion about a matter of legitimate public interest, and it is these functions that 'free speech' protections are intended to foster." (Petition, p. A13). For the reasons stated in the Petition, the lower court applied the wrong standard for free speech protection in this case.

Respondent's reliance on the "fighting words" doctrine is grossly misplaced. Respondent is certainly not suggesting that, as a result of the speech, he was inclined to "breach the peace" by assaulting the Petitioner in some manner and that, therefore, the conduct was unprotected. If Respondent is suggesting that the speech presented a "clear and present danger of riot, disorder...or other immediate threat to public safety, peace, or order," *Feiner v. New York*, 340 U.S. 315, 320 (1951), there is simply no evidence to support such a contention. No disorder resulted from the speech; the university subsequently responded to the speech by releasing the impounded funds and implementing the Title III program. Petitioner was later terminated for giving the speech.

D. THERE ARE NO "NON-CONSTITUTIONAL" BASES FOR THE DECISION BELOW.

This case lacks any non-constitutional issues. The case went to trial on three constitutional issues: a first amendment issue, a claim that Petitioner was deprived of liberty with due process of law, and an equal protection issue – all under the Constitution of the United States.

Respondent asks the Court to deny the Petition because he should have prevailed on the Mt. Healthy issue. Again, the point is that Petitioner prevailed on the Mt. Healthy issue at the trial level and the New Mexico Court of Appeals did not reach it.

V. CONCLUSION

Petitioner submits that the issue is not *whether* the Court should clarify the proper standard defining the extent of a faculty member's right of free speech, but simply *when* it should do so. As demonstrated in the Petition, in the twelve years since the *Pickering* and *Tinker* decisions were announced, this issue has been left to a highly subjective case-by-case determination so that what were relatively general guidelines in the first instance have become even less helpful by varied and inconsistent application.

Petitioner is not asking the Court to decide all future cases in this area. However, the Court should, at least, decide or confirm that a faculty member's expressive conduct is constitutionally protected unless it causes or imminently threatens to cause some interference with or disruption of school activities. At least, the Court should decide or confirm that any such interference or disruption must be substantial or material. Furthermore, the Court should decide or confirm that the interference or disruption must be related to valid institutional objectives as opposed to a purely personal adverse reaction such as "the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969).

While there are undoubtedly other such guidelines the Court could well choose to address, if it did no more than decide these fundamental issues, it would thereby establish or re-establish a working framework for individual conduct and for resolution of disputed issues in this vital area. In the absence of any action by this Court, the decision of the lower courts can reasonably be expected to continue to radiate in numerous directions citing the *Pickering* and *Tinker* decisions simply as touchstones from which to depart.

This case presents the timely and proper occasion to re-establish the focus required by the First Amendment in this vital area because the facts are clear, the issues are concretely framed by those facts, and the decision of the lower court seriously jeopardizes this Court's prior holdings more than any such decision to date. Unless this petition is granted, the chilling effect of decisions such as that of the lower court will most certainly continue to intimidate faculty from their honest and important expressions of opinion on public issues.

Now is the time to provide those "sensitive tools which clearly inform teachers what is being proscribed." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

Respectfully submitted,

JERRY WERTHEIM

STEVEN L. TUCKER

JOHN WENTWORTH

JONES, GALLEGOS, SNEAD & WERTHEIM, P.A.
Post Office Box 2228
Santa Fe, New Mexico 87501
(505) 982-2691

Attorneys for Petitioner

DATED: July 31, 1981